Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

ALBERT THOMAS MADRID

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeals for the Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Question One: Whether *Apprendi* error (*Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000)) properly preserved in the District Court is "structural error" under *Arizona v. Fulminante*, 499 U.S. 279, 111 S.Ct. 1246 (1991) (the question this Court explicitly left open in *U.S. v. Cotton*, 535 U.S. 625, 122 S. Ct. 1781 (2002)).

Question Two: Whether the doctrine of "harmless error" should shield the actions of a sentencing judge who explicitly and purposely refuses to follow the law and then purports to find his own "error" in doing so "harmless."

Question Three: Whether the Court of Appeals decision contradicts this Court's decisions in *Dutton v. Evans*, 400 U.S. 74, 91 S:Ct. 210 (1970) and *Delaware v. Van Arsdall*, 475 U.S. 673, 106 S.Ct. 1431 (1986) by failing to review Petitioner Madrid's Confrontation Clause claim under the standard for Constitutional errors mandated by *Chapman v. California*, 386 U.S. 18, 87 S.Ct 824 (1967).

Question Four: Whether a "partners in crime" exception applies to the adverse spousal testimony privilege and whether the court of appeals erroneously concluded that Knock lacked standing to challenge the district court's creation of the exception. (Madrid joins in, and incorporates here by reference as if set out in full, the argument of co-defendant Knock in this regard, presented in Knock's Petition for Writ of Certiorari submitted to this Court seeking review of Knock's convictions in this matter.)

PARTIES TO PROCEEDING

1. Albert Madrid, Defendant

2. John Knock, Defendant

3. The United States, Plaintiff

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OPINION BELOW

United States v. John Richard Knock and Albert Thomas Madrid, (unpublished) Case Number 01-10894-BB (11th Cir. June 6, 2003), rehearing and rehearing *en banc* denied July 31, 2003, District Court Docket Number 94-01009-CR-1-MMP.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit in case number 01-10894-BB was entered on June 6, 2003 (Appendix ["App."] pp. 1a-11a). Rehearing and rehearing en banc were denied on July 31, 2003 (App. pp. 30a-31a). The jurisdiction of the Court is invoked pursuant to Title 28 United States Code § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendments 5, 6, 14 (App. p. 32a).

STATEMENT OF THE CASE AND FACTS

Procedural Summary

This petition seeks review of a judgment of the United States Court of Appeals for the Eleventh Circuit ("the Court of Appeals") (App. p. 1a-11a), affirming a judgment of the United States District Court, Northern District of Florida, Gainesville Division ("the district court") convicting and sentencing petitioner Albert Madrid ("Madrid") to life in prison for a non-violent marijuana conspiracy offense. The district court had original jurisdiction under 18 U.S.C. § 3231.

On February 17, 1999, in the Northern District of Florida, Madrid and his co-defendant, John Knock, were charged in three substantive counts in a Superceding Indictment: Conspiracy to possess with intent to distribute marijuana (Count One); conspiracy to import marijuana (Count Two); and conspiracy to launder money (Count Three). Count Four was a forfeiture count.

Madrid pled not guilty to those charges on March 11, 1999. After 15 days of trial and nearly twenty hours of deliberations, Madrid was acquitted on May 30, 2000, of Counts Two and Three, and convicted of Count One and the forfeiture count. Co-defendant Knock was convicted on all counts. Final judgment was entered on May 31, 2000. The district court sentenced both defendants to life imprisonment on January 30, 2001. (App. pp. 12a-19a.) Notice of Appeal was timely filed on March 9, 2001. By *per curiam* Order filed June 6, 2003, the Court of Appeals affirmed Madrid's conviction and sentence. (App. p. 1a-11a.) By order dated July 31, 2003, the Court of Appeals denied Madrid's petition for rehearing and rehearing *en banc*. (App. p. 30a-31a.)

Factual Summary

A. Overview

As noted above, Madrid and co-defendant Knock were charged in three substantive counts: Conspiracy to possess with intent to distribute marijuana; conspiracy to import marijuana; and conspiracy to launder money. The government contended that Madrid and Knock were high-ranking participants in an overarching conspiracy spanning more than ten years and involving several multi-ton shiploads of hashish and marijuana.

Madrid's defense at trial had three inter-related components. While essentially conceding that he had been involved in some of the marijuana and hash importation activities, Madrid sought to establish through cross-examination of government witnesses that rather than the single overarching conspiracy charged by the government, there were multiple independent projects orchestrated by a third separately-charged co-defendant, Claude Duboc, involving approximately twenty-five people forming different crews with no standing agreement among them all to continue beyond any of the individual projects.

Second, Madrid did not participate further in any of Duboc's projects after Madrid completed distributing the product and collecting the money for a 1992 Vancouver load, in which each of the packages of hashish had been marked with a stamp reading "grand finale" to reflect that it was intended to be the last load by Madrid and others. (The 1992 Vancouver load led to Madrid's arrest and eventual incarceration in Canada prior to his indictment in the instant case).

Finally, there was a nearly five-year delay from when Knock and Duboc were indicted to when the government indicted Madrid. This raised a serious statute of limitations

problem for the government: In order to convict Madrid, the government had to show that the single overarching conspiracy alleged by the government had not terminated prior to February 17, 1994.

Madrid therefore endeavored to undercut the government's limited evidence of acts in furtherance of the alleged conspiracy occurring after this February 17, 1994 cut-off date. While the government presented a great deal of evidence concerning marijuana and hashish trafficking from 1982 forward, there was very little evidence of acts in furtherance of the conspiracy after this February 17, 1994 cut-off date.

The success of Madrid's defense is revealed by the jury's verdicts: Madrid was *acquitted* of the money laundering and importation counts, and was convicted only of possession with intent to distribute. This central fact cannot be emphasized enough: The jury's verdicts constituted a clear repudiation of the government's theory of the case. *Madrid's acquittals are completely inconsistent with the existence of the single overarching conspiracy alleged by the government.* This illustrates the highly prejudicial nature of the improperly admitted hearsay that is the subject of Question Presented Number Three, discussed in more detail below.

B. Facts Regarding The Imposition of an Illegal Sentence (Questions Presented Numbers One and Two)

After the jury had returned its verdicts but before sentencing, this Court decided *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

Madrid was sentenced to life in prison under 21 U.S.C. § 841(b), which creates a three-tiered sentencing system for marijuana offenses based upon drug quantity. Where no quantity is specified in the indictment and determined by the

jury beyond a reasonable doubt, the maximum permissible sentence is five years. *U.S. v. Allen*, 302 F.3d 1260 (11th Cir. 2002).

The district court acknowledged explicitly in its sentencing order (App. pp. 20a-29a) that sentencing Madrid to life was not permissible under the rule this Court announced in *Apprendi* because drug quantity had not been pled in the indictment nor proven to or found by the jury beyond reasonable doubt.

The district court avoided the clear requirement of the law by mischaracterizing the *Apprendi* error as having already occurred (when in fact no error had been committed at that point because no sentence had yet been imposed), then purporting to find its own "prior errors" harmless. (App. p. 26a).

C. Facts Regarding the Improper Admission of Hearsay Evidence (Question Presented Number Three)

Madrid had previously pled guilty in Canada to drug and money laundering offenses, pursuant to a written plea agreement. (App. p. 33a-37a.) These charges arose from activities alleged by the government to be part of the overarching conspiracy charged in this case.

Attached to the Canadian plea agreement were four appendices designated as A, B, C and D.[1] (App. pp. 38a-53a.) Appendix A is labeled "Statement of Facts: Albert Madrid" and is a seven-page summary of the Canadian

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[1] Appendices B, C and D all relate to Madrid's surrender of the contents of a Singapore bank account.

government's investigation leading to the Canadian charges.[2] (App. pp. 38a-49a.)

The plea agreement itself was signed by Theresa Brucker of Canada's Attorney General's office and by Madrid's Canadian criminal defense lawyer, David Gibbons, on July 22, 1996. (App. p. 37a.) Madrid personally signed Appendix B on September 12, 1996 (App. p. 51a) and Appendices C and D on December 12, 1996 (App. pp. 52a-53a). Neither Madrid nor Gibbons signed Appendix A. Gibbons submitted a declaration to the district court stating that he discussed the matter with Madrid and Madrid explicitly told Gibbons he was not authorized to admit the facts contained in Appendix A. (App. pp. 54a-56a.) Gibbons assured Madrid that Gibbons' signature on the plea agreement itself would not constitute an admission of the government's version of the facts contained in Appendix A. (App. p. 55a.)

Over Madrid's objection, Appendix A was admitted into evidence at trial and was read to the jury by a prosecution witness.

ARGUMENT

I. CERTIORARI SHOULD BE GRANTED TO ANSWER THE QUESTION LEFT OPEN BY THIS COURT IN *U.S. v. COTTON*; WHETHER PROPERLY-PRESERVED *APPRENDI* ERROR CONSTITUTES STRUCTURAL ERROR UNDER *ARIZONA v. FULMINANTE*.

Certiorari should be granted here because the Eleventh Circuit has decided an important question of federal law that

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[2] RCMP Officer Russ Leffler, testifying for the government at trial, explained that Appendix A was drafted by a Canadian prosecutor on the basis of law enforcement investigation reports.

has not been, but should be, settled by this Court; namely, whether properly-preserved *Apprendi* error constitutes structural error under *Arizona v. Fulminante*. (U.S. Sup. Ct. Rule 10.1(a)).

In *Arizona v. Fulminante*, 499 U.S. 279, 111 S.Ct. 1246 (1991), the Court defined structural errors as involving rights "so basic to a fair trial that their infraction can never be treated as harmless error." 499 U.S. at 308, 111 S.Ct. 1264 (quoting *Chapman,* 386 U.S. at 23, 87 S.Ct. 828).

The Eleventh Circuit held in *U.S. v. Nealy*, 232 F.3d 825, 830 (11th Cir. 2000) that *Apprendi* error is not structural, and that even where objection to *Apprendi* error is raised below, the appropriate standard of review is "harmless error" under Fed.R.Crim.P. Rule 52(a). *Nealy* directs that in order to discern whether the error is harmless, a reviewing court should evaluate the evidence presented at trial. 232 F.3d at 830. The Eleventh Circuit affirmed *Nealy* in *U.S. v. Sanchez*, 269 F.3d 1250, 1272-1273 (2001), and followed *Nealy* and *Sanchez* in *U.S v. Anderson*, 289 F.3d 1321 (11th Cir. 2002). *Anderson* held that *Apprendi* error is harmless if, "[N]o reasonable juror could have found the defendant guilty without also finding that the specific quantity of drugs was involved." 289 F.3d at 1327.

This Court, however, has not resolved the issue of whether *Apprendi* error is structural, and therefore not susceptible to a harmless error analysis. This Court expressly left that question open in *U.S. v. Cotton*, 535 U.S. 625, 633, 122 S.Ct. 1781, 1786 (2002). In *Cotton*, this Court analyzed the defendants' *Apprendi* claim under the "plain error" standard of Fed.R.Crim.P. Rule 52(b), because the defendants had not objected below. Under Rule 52(b), reviewing courts apply a four-part test: There must be

(1) error, (2) that is plain, and (3) that affects substantial rights. If these three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error,

but only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. 535 U.S. at 633, 122 S. Ct. at 1786.

This Court cited to its prior decision in *Johnson v. U.S.*, 520 U.S. 461, 117 S.Ct. 1544 (1997), where it had explained that even structural errors are subject to Rule 52(b) analysis. 520 U.S. at 465-470, 117 S.Ct. 1547-1550. *Johnson* recognized that it might be true that if an error is structural it will always "affect substantial rights," but pointed out that there is no need to reach that question if the reviewing court determines that the claim fails on Rule 52(b)'s fourth prong. *Id.* In *Cotton*, this Court rejected the defendants' *Apprendi* claims on that basis, finding that on the facts before it, "[T]he error did not seriously affect the fairness, integrity, or public reputation of judicial proceedings." 535 U.S. at 633, 122 S. Ct. at 1786.

Here, unlike *Cotton*, defendants objected in the district court on *Apprendi* grounds to the imposition of their life sentences. By objecting below, Madrid preserved the error, rendering it beyond the ambit of Rule 52(b) and that rule's fourth prong requirement. The error is therefore analyzed under Rule 52(a), and reversal is required if it affects the defendant's substantial rights. *See U.S. v. Olano*, 507 U.S. 725, 734, 113 S.Ct. 1778 (1993).

This case therefore squarely presents the issue left open by *Cotton*. Madrid respectfully submits that *Apprendi* error is structural and therefore always affects substantial rights. Where, as here, objection below properly preserves the issue, *Apprendi* error should be per se reversible.

II. CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER THE DOCTRINE OF "HARMLESS ERROR" SHOULD SHIELD THE ACTIONS OF A SENTENCING JUDGE WHO EXPLICITLY AND PURPOSELY REFUSES TO FOLLOW THE LAW AND THEN PURPORTS TO FIND HIS OWN "ERROR" IN DOING SO "HARMLESS."

Even if this Court determines that properly-preserved *Apprendi* errors are not in themselves structural errors (see Argument I, *supra*), certiorari should nonetheless be granted here because the Court of Appeals sanctioned the district court's extreme departure from the accepted and usual course of judicial proceedings, such as to call for an exercise of this Court's supervisory power. (U.S. Sup. Ct. Rule 10.1(a)).

This case is in a very unique posture. Absent a record like this one, a reviewing court could not assume that a district court intentionally "erred" rather than simply misapplied the law. The normal assumption must be that a district court is conscientiously applying the law. However, here the district court acknowledged on the record that a life sentence would be illegal under *Apprendi* but then imposed that sentence anyway after purporting to apply "harmless error" review to its own actions.

Harmless error review is applied (by ***appellate*** courts) to ***trial*** errors but not ***sentencing*** errors. *Apprendi* error is normally considered trial error. This makes analytical sense because *Apprendi* error is the failure to charge in the indictment, instruct the jury, and require a jury finding beyond a reasonable doubt as to drug quantity. Once the issue is before the appellate court, the sentence has been imposed, and that sentence would be legal but for those trial errors. The cohesion of this analytical framework is lost, however, when the district court usurps the appellate review

function as the district court did here.

Here, at the time of sentencing, there had been no ***trial error*** under the charges set forth in the indictment. Madrid was urging the district court not to commit *Apprendi* error by imposing an enhanced sentence on the basis of drug quantities that had not been found beyond a reasonable doubt by the jury.

The failure to instruct the jury regarding drug quantity, and the failure to require from the jury a finding beyond reasonable doubt as to drug quantity, were not ***errors*** at the time the district court issued its Order. Those failures merely meant that under *Apprendi*, Madrid could only be sentenced to a maximum of five years under the catch-all provision. It was not until the ***sentencing*** in this case, when the district court imposed an enhanced sentence based upon drug quantity not proven to the jury, that error occurred. Without ***trial*** error, the harmless error analysis of *Nealy*, *Sanchez* and *Anderson*, *supra*, is inapplicable.

This case is not simply about felicitous timing – Madrid's having been found guilty before but sentenced after *Apprendi* was decided. The important question here for the integrity of the judicial system, which merits this Court granting certiorari, is not whether a ***reviewing court*** can apply harmless error review to *Apprendi* error in cases where *Apprendi* was decided after trial but before sentencing. Of course it can. The determinative question is not, "At which stage of the proceedings was *Apprendi* decided?" but rather whether the district court committed a good-faith error as opposed to a result-oriented express disregard for the rule of law announced by this Court.

There may often be a multitude of interpretations and unanswered questions among lower courts in the wake of a decision like *Apprendi* that so radically alters the legal landscape. District court judges operating in good faith in the rough and tumble world of complex federal criminal trials

are bound to make honest mistakes especially in these transitionary periods, and such judges are entitled to the deference accorded by application of the Fed.R.Crim.P. Rule 52(a) standard of review. But that is not what happened here. The district court explicitly acknowledged it was refusing to follow the law as required by this Court in *Apprendi*, and purported to find its own "error" in doing so harmless. Such disregard for the law impugns the integrity of the judiciary and of the judicial process. This Court should grant certiorari to ensure that the rule of law is respected, even when the result of doing so may be unpalatable to district court judges.

Madrid submits that even if this Court determines that *Apprendi* error is not normally structural, the error here constitutes structural error because the fundamental requirement that district courts not purposefully refuse to apply controlling law is, "[S]o basic to a fair trial that [its] infraction can never be treated as harmless error." *Arizona v. Fulminante*, 499 U.S. at 308 (quoting *Chapman,* 386 U.S. at 23).

Finally, even if not rising to the level of structural error requiring *per se* reversal, the error here, under the unique facts of this case, constitute *sentencing* error rather than *trial* error, and must be reviewed under the harmless error review applied to sentencing errors: Whether, in the context of the sentencing proceedings, the error was harmless beyond a reasonable doubt in that it did not contribute to the sentence obtained. *Sochor v. Florida*, 504 U.S. 527, 540, 112 S.Ct. 123 (1992); *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828 (1967).

III. CERTIORARI SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS' DECISION CONTRADICTS THIS COURT'S DECISIONS AND WITH THE DECISION OF ANOTHER COURT OF APPEALS BY FAILING TO REVIEW MADRID'S CONFRONTATION CLAUSE CLAIM UNDER THE STANDARD FOR CONSTITUTIONAL ERRORS MANDATED BY *CHAPMAN v. CALIFORNIA*.

Certiorari should be granted here because the Eleventh Circuit has decided an important question of federal law in a way that conflicts with relevant decisions of this Court and with the decision of other United States Courts of Appeals on the same important matter; namely, how to determine the correct standard of review for the improper admission of hearsay rising to the level of a Confrontation Clause violation. (U.S. Sup. Ct. Rule 10.1(a) & (c)).

Madrid argued before the Court of Appeals that the district court erred in admitting Appendix A of the Canadian plea agreement, and that the erroneous admission of this hearsay evidence violated the Confrontation Clause. In addition, Madrid argued that the standard of review for this claim is that of *Chapman v. California*, 386 U.S. 18 (1967) which requires that the government prove the error was harmless beyond reasonable doubt. *Delaware v. Van Arsdall*, 475 U.S. 673, 684, 106 S.Ct. 1431, 1438 (1986); *Dutton v. Evans*, 400 U.S. 74, 91 S.Ct. 210 (1970); *U.S. v. Hunerlach*, 197 F.3d 1059, 1067 & n.9 (11th Cir. 1999),

The Court of Appeals dismissed Madrid's argument, holding that, "[A]ny error in admitting Appendix A of the plea agreement, if error at all, was harmless." (June 6, 2003 Slip Opinion affirming Madrid's conviction and sentence ("Slip Op."), at p. 12.) (App. p. 10a.) The Court of Appeals cited *U.S. v. De La Mata*, 266 F.3d 1275, 1300-1301 (11th Cir. 2001), and characterized the holding of *De*

La Mata as, "finding harmless error in the improper admission of hearsay against a criminal defendant." (Slip. Op. p. 12; App. p. 10a.)

The Court of Appeals relied solely upon *De La Mata* for its determination that any error was harmless, but its characterization of *De La Mata* is simply wrong. This improper reliance on *De La Mata* in deciding Madrid's Confrontation Clause challenge contradicts prior decisions of the Eleventh Circuit, other Courts of Appeals and the Supreme Court.

The Court of Appeals' reliance upon *De La Mata* is mistaken because *De La Mata* reviewed the defendant's claim that the district court improperly granted the government's hearsay objection and ***refused to admit*** evidence that the defendant proffered. *U.S. v. De La Mata*, 266 F.3d at 1300-1301. There was therefore no Confrontation Clause issue. Madrid explicitly pointed this out in his Reply Brief.

In *Dutton v. Evans*, a plurality of this Court established a four-factor test for determining whether admission of hearsay amounts to a constitutional violation, a test which has subsequently been adopted by every other circuit. *See, e.g., U.S. v. Puco*, 476 U.S. 1099, 1104 (2nd Cir. 1973); *U.S. v. Pecora*, 798 F.2d. 614, 628 (3rd Cir. 1986); *U.S. v. West*, 574 F.2d 1131, 1136 (4th Cir. 1978); *Gochicoa v. Johnson*, 238 F.3d 278, 282 (5th Cir. 2000); *Phillips v. Neil*, 452 F.2d 337, 345 (6th Cir. 1971); *Mattes v. Gagnon*, 700 F.2d 1096, 1103 (7th Cir. 1983); *U.S. v. Snow*, 521 F.2d 730 (9th Cir. 1976); *U.S. v. Castillo*, 615 F.2d 878 (9th Cir. 1980); *U.S. v. Montgomery*, 582 F.2d 514, 519 (10th Cir. 1978).

As stated by the Court in *Snow*, *supra*, the *Dutton* test looks to the following indicia of reliability to make this determination: (1) whether the declaration contains an assertion of a past fact, (2) whether the declarant had

personal knowledge of the identity and role of the participants in the crime; (3) the possibility that the declarant is relying upon faulty recollection; (4) whether, under the circumstances, there is reason to believe that the declarant misrepresented the defendant's involvement.

Instead of applying the test set out in *Dutton* to determine whether the claimed hearsay violation rose to the level of a Confrontation Clause violation requiring the *Chapman* standard of review, the Court of Appeals improperly relied upon *De La Mata* to apply the non-constitutional Fed.R.Crim.P. Rule 52(a) harmless error standard of review.

The Court of Appeals' misplaced reliance upon *De La Mata* is even more inexplicable in light of the Eleventh Circuit's prior decision in *Hunerlach*, which, unlike *De La Mata*, *did* address a defendant's claim that hearsay evidence had been improperly admitted against him in violation of the Confrontation Clause. *U.S. v. Hunerlach*, 197 F.3d at 1059, 1067 & n.9. In *Hunerlach*, though not explicitly applying this Court's *Dutton* test, the Eleventh Circuit held that improper admission of hearsay evidence implicates the Confrontation Clause and therefore requires review under the *Chapman* standard, citing this Court's decision in *Delaware v. Van Arsdall*.

In sum, the Court of Appeals' decision here misstates the facts and holding of *De La Mata* on the crucial point for which it was cited. The Court of Appeals' decision directly contradicts its own prior decisions, and prior decisions of other circuits and of this Court. Under the *Dutton* test, the improper admission of Appendix A to the Canadian Plea agreement violated Madrid's rights under the Confrontation Clause and should have been reviewed under the *Chapman* harmless error standard. Under that standard of review, the error cannot be deemed harmless.

Though this error clearly meets this Court's standards for

granting certiorari, much more is at stake here than the Court of Appeals' consistency with its own, other circuits' and this Court's prior holdings.

Madrid was sentenced to spend the rest of his life in prison for a non-violent marijuana distribution offense. He was acquitted of the other two counts, of which his co-defendant was convicted. Unlike the apparent certainty concerning co-defendant Knock's guilt, the jury obviously had grave reservations about the government's case against Madrid. The Court of Appeals' conclusory assertion, based upon a plainly mistaken reading of the only case cited in support, that any error in admitting Appendix A of the plea agreement was harmless because of the "overwhelming evidence presented in the lengthy criminal trial against Madrid" (App. p. 10a) is belied by Madrid's acquittal on two counts. Those acquittals constitute an explicit rejection of the government's "overarching conspiracy" theory of this case. Large portions of the "overwhelming evidence" were clearly rejected by the jury, at least insofar as that evidence pertained to ***Madrid's*** guilt.

The Court of Appeals' erroneous application of the wrong standard of review here matters. Given the close question this case obviously presented to the jury, presenting Appendix A to the jury as essentially an admission by Madrid to the central allegations of the government's case was devastating. The government has not "show[n] beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Sullivan v. Louisiana*, 508 U.S. 275, 279, 113 S.Ct. 2078, 2081 (1993), quoting *Chapman*, 386 U.S. at 24, 87 S.Ct. 828.

A brief overview of Madrid's argument is presented here so that this Court can properly assess the impact of Appendix A in Madrid's trial.

A. The Inadmissibility of Appendix A

Over Madrid's objection the Canadian plea agreement and Appendix A were admitted as evidence and a D.E.A. agent read aloud to the jury much of Appendix A. The district court found Appendix A admissible under Fed.R.Evid. Rule 801(d)(2) as an admission made by an authorized party or agent, based on the court's conclusion that Madrid's Canadian defense attorney, Gibbons, admitted on Madrid's behalf the veracity of the facts described in Appendix A. (App. pp. 57a-86a.)

The district court's ruling was erroneous. Appendix A was not admissible under Rule 801(d)(2) or any other exception to the hearsay rule. It was nothing more than a summary of the government's entire investigation, and represented what the government intended to argue to the sentencing court in support of the sentence it was seeking. It contained information obtained from third parties, the veracity of which Madrid could not possibly have known. Madrid did not make nor adopt the factual assertions of Appendix A, nor did Madrid authorize Gibbons to do so. Gibbons did not purport to admit the facts in Appendix A on Madrid's behalf, and stated in a declaration submitted to the district court that he did not intend to admit them. (App. pp. 54a-56a).

According to his declaration, Gibbons was aware at the time of the Canadian plea negotiations that Madrid might be prosecuted in the United States. He was determined that any admission by Madrid would be limited to his actual guilty plea to the three counts, and specifically discussed this issue with Madrid. Madrid explicitly limited the scope of Gibbons' agency to deny Gibbons the authority to admit on his behalf the facts alleged in Appendix A. (App. pp. 54a-56a.) Even had Gibbons purported to do so, such would have exceeded the scope of Gibbons' agency because Madrid specifically

excluded such an admission from his authorization for Gibbons to act as his agent concerning the Canadian plea negotiations. (App. p. 55a.)

The Court of Appeals relied instead upon a declaration submitted by Theresa Brucker, who signed the Canadian plea agreement on behalf of the Canadian government. The Court found that it did not have to decide the central question presented in Madrid's argument, whether Gibbons was authorized to admit the facts in Appendix A on Madrid's behalf, despite the fact that the district court expressly relied upon that theory in ruling that Appendix A was admissible. The Court of Appeals found this crucial issue irrelevant because, "If the statement of facts contained in Appendix A to the Canadian plea agreement was not intended to be part of Madrid's plea agreement, then the plea itself, according to Ms. Brucker, would not have been valid." (App. p. 9a.)

With all due respect, the Court of Appeals' reasoning is less than clear. Whether or not the plea itself was valid is irrelevant to the admissibility of Appendix A. Assuming but not conceding that Brucker's declaration is credible and that what she said means that the plea agreement "would not have been valid," Appendix A was admissible only if Madrid adopted by admission the statements it contained. The district court found it to be an adoptive admission via agency. Even if Madrid and Gibbons were mistaken in their belief that Madrid could enter a valid plea pursuant to the agreement without admitting the facts in Appendix A, it was not admissible as an adoptive admission.

There was insufficient evidence before the district court and the Court of Appeals to conclude one way or the other on the underlying issue of substantive Canadian law, and the district court apparently made no effort to ascertain what Canadian law requires or provides in this regard. Madrid cited in his briefing below Canadian case law which contradicts the panel's interpretation of Brucker's

declaration. But that is irrelevant to whether or not Gibbons was authorized to admit on Madrid's behalf the facts alleged in Appendix A. He plainly was not, and Ms. Brucker's declaration provided no information to contradict that fact.

Appendix A was hearsay. It was only admissible if a specific exception to the hearsay rule made it so. The only possibly applicable exceptions are those contained in Rule 801(d)(2). Those exceptions are limited to statements that are made with specific authority or within the scope of agency. Appendix A was therefore admissible only if Gibbons was authorized to make those admissions on Madrid's behalf. Gibbons' declaration stated plainly that he was not so authorized. Appendix A was inadmissible hearsay.

B. The Prejudicial Impact of Appendix A

Under the *Chapman* standard, the government cannot carry its burden of showing beyond a reasonable doubt that admission of Appendix A did not contribute to the guilty verdict. By portraying the facts alleged by the Canadian government as Madrid's personal admissions, the government told the jury that Madrid had essentially confessed to every one of those facts.

The government presented a great deal of evidence concerning the charged offenses. There was ample physical evidence of large-scale marijuana importation and distribution operations. Madrid's defense focused though cross-examination on challenging the government's theory of a single overarching conspiracy as alleged in the three counts in the indictment, and on establishing that Madrid had withdrawn from all conspiracies after the 1992 Vancouver project had concluded in 1993, and before the applicable statute of limitations date of February 17, 1994. Attributing the facts alleged in Appendix A to Madrid as his personal admissions eviscerated Madrid's defense.

The jury obviously had doubts about Madrid's culpability: he was ***acquitted*** of two of the three counts charged. The jury also sent a note to the judge during deliberations highlighting the critical importance of Madrid's Canadian activities to their deliberations.

It is evident that despite the government's ample physical evidence of criminal activity, the jury rejected the contention that Madrid participated in the single overarching conspiracy alleged by the government. Absent the information in Appendix A being portrayed by the government as a confession by Madrid to his continued participation in an overarching conspiracy after February 17, 1994, it is reasonably likely that Madrid would have been acquitted of three instead of two counts.

Certiorari should be granted for all of the reasons stated herein, and especially to correct the grave injustice of condemning Madrid to life in prison on the basis of improperly admitted unreliable hearsay evidence in violation of the Confrontation Clause.

IV. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE QUESTIONS LEFT OPEN BY THIS COURT'S DECISION IN *TRAMMEL v. UNITED STATES*; WHETHER THE "PARTNERS IN CRIME" EXCEPTION APPLIES TO THE ADVERSE SPOUSAL TESTIMONY PRIVILEGE AND WHETHER THE DEFENDANT/NON-WITNESS SPOUSE MAY CHALLENGE THE DISTRICT COURT'S APPLICATION OF THE EXCEPTION ON APPEAL.

Madrid adopts, joins in, and incorporates here by reference as if set out in full, the arguments of co-defendant Knock in this regard, presented (as Question One) in Knock's Petition for Writ of Certiorari submitted to this

Court seeking review of Knock's convictions in this matter, and further submits the following:

Madrid's trial counsel, Daar, expressed his concern that the jury had been prejudiced against Madrid by Ms. Knock's testimony and the discussion of $2.5 million for attorney's fees she obtained for her husband. Daar requested that he be permitted to rebut the implication that Madrid's attorney's fees had come from monies discussed by Ms. Knock. Daar sought to present testimony from Madrid's mother concerning the attorney's fees Daar had been paid to represent Madrid. Daar made a proffer that if allowed to testify, Ms. Madrid would state that the attorney's fees that Daar received, "[C]ame from a combination of the twenty-five thousand dollars [sic] loan from her sister and money in her pension retirement and savings account."

The district court refused to permit the testimony.

For the reasons stated in Knock's submissions below and to this Court, the district court erred in compelling Ms. Knock's testimony concerning attorney's fees, and Madrid's due process and Sixth Amendment rights were similarly violated. The error was prejudicial as to Madrid because it strongly suggested to the jury that his attorney's fees may also have come from other members of the conspiracy. The error was compounded by the district court's refusal to permit Madrid to rebut that implication. While the district court is granted broad discretion in evidentiary matters, it abused its discretion here and the error was prejudicial.

As noted, *supra*, the jury's acquittal of Madrid on two of the three substantive counts evinces that Madrid's participation in the over-arching conspiracy alleged by the government was a close call for the jury. In this context, there is a reasonable likelihood that the error here affected Madrid's substantial rights and had a substantial influence on the outcome of the trial.

CONCLUSION

For the foregoing reasons, Madrid respectfully requests that certiorari be granted.

Dated: October 28, 2003

Respectfully submitted,

RANDOLPH DAAR
Attorney for Petitioner
ALBERT MADRID

APPENDIX

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
[File-Stamp]
[June 6, 2003]

No. 01-10894

D.C. Docket No. 94-01009-CR-1-MMP

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOHN RICHARD KNOCK,
a.k.a. John Richard Phillips,
a.k.a. Mickey Ryan,
a.k.a. Michael Philip Ryan,
ALBERT THOMAS MADRID,

Defendants-Appellants.

Appeals from the United States District Court
for the Northern District of Florida

(June 6, 2003)
Before BIRCH, HULL and RONEY Circuit Judges.

PER CURIAM:

Defendants John Knock and Alfred Madrid appeal their convictions and life sentences in connection with a conspiracy to possess with the intent to distribute marijuana, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A)(vii), and 846. They argue several trial errors: (1) failing to disqualify Knock's attorney; (2) compelling Knock's wife to testify against him; (3) constructively amending the indictment; (4) admitting into evidence a plea agreement Madrid made in Canada; (5) excluding the testimony of Madrid's mother; and (6) violating *Apprendi* in sentencing. We AFFIRM.

A. The Defendants' Drug Conspiracy.

Viewing the record in the light most favorable to the government, Defendant Knock headed a drug organization from 1984 to 1993 that imported and distributed approximately 790,000 pounds of marijuana into the United States, and in turn laundered proceedings from that drug operation. When the penalties for United States drug offenses became more severe in the 1990's, Defendant Knock conducted less business in the United States and transferred some of his business to Canada. Defendant Madrid worked directly under Knock, engaging in offloading and distribution of the marijuana during the conspiracy. Madrid was present at stash-houses where the hashish was stored. In 1987, a ship containing thirty (30) tons of marijuana was transported into California. The marijuana was offloaded and taken to Madrid's nearby property, where Knock, Madrid, and others re-packaged the marijuana for distribution.

Canadian officers apprehended Madrid in Vancouver in July 1992. After bonding out of Canadian prison, Madrid fled to Mexico and was arrested by Mexican officials at the request of the Canadian government. Madrid was sent back

to Canada for prosecution. He eventually entered into a plea agreement with Canadian officials. Knock fled to France, was arrested by French officials, and fought extradition to the United States. Knock was eventually extradited and subsequently arrested in Gainesville, Florida. Shortly thereafter, Madrid was extradited from Canada to the United States for the instant criminal case.

A grand jury charged the defendants with the following: Count 1 - conspiracy to possess with the intent to distribute marijuana, 21 U.S.C. § 841(a)(1) and b(1)(A)(vii); Count 2 - conspiracy to import marijuana, 21 U.S.C. § 963; Count 3 - conspiracy to commit money laundering, 18 U.S.C. § 1956(h); and Count 4 - criminal forfeiture, 21 U.S.C. § 853. The jury convicted Knock as charged but only convicted Madrid as to Count 1. No drug quantity was alleged in the indictment. The defendants were both sentenced to life imprisonment. Defendants timely appealed to this Court making several overlapping arguments.

B. The District Court Properly (1) Denied the Government's Disqualification Motion of Kennedy and (2) Ruled that Knock Waived Any Potential Conflict Relating to Kennedy Representing Him.

The government filed a pre-trial motion to disqualify Michael Kennedy, Knock's attorney, expressing, *inter alia*, its concern that (1) Kennedy could have a potential conflict in his former representation of Naomi Knock, a potential adverse witness, and (2) that Kennedy was subject of grand jury investigation in New Jersey.. Attached to the government's motion was a letter seized by French prison officials to Knock from his wife, Naomi. This letter is the subject of various arguments in Defendants' appeal. The letter primarily concerned Kennedy's attorney fee and referenced Naomi's recent contacts with Kennedy regarding

the same. Knock vigorously opposed the government's motion to disqualify Kennedy in a detailed memorandum of law. The district court ultimately denied the government's motion, ruling *in favor of* Knock.

Knock, nevertheless, appeals the denial, arguing that the district court erred in not specifically informing him that Naomi's testimony and letter could prejudice him by implicating Kennedy in a crime. The record is replete with evidence that Knock was made fully aware of all possible conflicts relating to Kennedy serving as his attorney. There is undisputed evidence that Knock, both personally and through his counsel Kennedy, sought to waive all of these conflicts. It is axiomatic that there is both a presumption in favor of a defendant's counsel of choice, and that a trial court as "substantial latitude" in deciding whether to disqualify counsel. *Wheat v. United States*, 486 U.S. 153, 163 (1988). The district court carefully considered several permutations involving Kennedy's involvement in this case in its pre-trial order denying the government's motion to disqualify. The district court then revisited these permutations at a subsequent *Garcia* hearing, where it throughly [*sic*] advised and questioned Knock on a litany of potential conflicts. *See United States v. Garcia*, 517 F.2d 272 (5th Cir. 1975). Repeatedly, Knock testified that he waived all conflicts in Kennedy representing him. As Knock unequivocally testified throughout the *Garcia* hearing, "I waive any conflict ... I have no desire to talk to another attorney .... I have no need to question [Kennedy's] representation of me."

At the conclusion of that hearing, Kennedy, who continues to represent Knock on this appeal, stated to the district court:

> And I want to make it clear that I have discussed [the potential conflict] in detail

> with Mr. Knock, and I have encouraged him, as he has a right to do, to obtain another lawyer permanently or just for the purposes of discussing this, and I believe he understands that. And I'll say as an officer of the court I believe this to be a knowing, intelligent waiver on his part.

The district court properly held that any conflicts of interest relating to Kennedy representing Knock were waivable. In any event, there is reasonable argument that the evidence before the court showed no actual conflict to exist. Under the totality of the circumstances, the district court did not err by finding waiver of conflict, if there was a conflict at all, and did not abuse its discretion by denying the government's motion to disqualify. *See generally Freund v. Butterworth*, 165 F.3d 839 (11th Cir. 1999(en banc).

C. Compelling Knock's Wife to Testify Against Him at Trial Was Not Reversible Error.

Knock argues that the district court violated the adverse spousal testimony privilege by granting the government's motion to compel his wife to testify against him.

Government witnesses testified that Naomi Knock gave a suitcase filled with $1,000,000 in German currency to an unindicted co-conspirator, Steve Abelman, suggesting (1) that the $1,000,000 were proceeds from the alleged drug conspiracy, and (2) that Naomi was attempting to launder those proceeds. The government thereafter sought to call Naomi to testify. Naomi objected to testifying by asserting (1) her Fifth Amendment right against self-incrimination, which the government dispelled by granting her immunity, (2) the adverse spousal testimony privilege, and (3) the confidential marital communications privilege. The

government filed a motion to compel Noami's [*sic*] testimony. Knock opposed the motion to compel, asserting, *inter alia*, the confidential marital communications privilege. After a hearing, the court ruled that Naomi's marital communications and spousal witness privilege claims were overcome by a joint participants in crime exception to those privileges. Knock then objected to Naomi testifying and moved for a mistrial, which the district court denied.

Naomi testified that she had written a letter to her husband, stating that she had discussions with Kennedy and that overall attorneys' fees and costs would be $2.5 million. Naomi further testified that the $1,000,000 referred to by Abelman "would probably be consistent" with the total amount that was passed on to Abelman in order to assist with her husband's defense but insisted that she did not *directly* pass the $1,000,000 to Abelman. Naomi then testified that she, at her husband's request, had "released" $1,000,000 in funds for her husband's defense. She insisted that she neither had "control" of those funds nor did she know where they came from. Knock's counsel did not cross-examine Naomi.

Knock now attempts to assert the adverse spousal testimony privilege by arguing that the district court legally erred by "unilaterally" creating a joint participant in crime exception to the spousal witness privilege during trial, an exception recognized by other circuits courts but not expressly by this Court. *See, e.g., United States v. Clark*, 712 F.2d 299, 301 (7th Cir. 1983). This Court need not reach the district court's application of this exception because the Supreme Court has established that the adverse spousal witness privilege belongs to the testifying spouse and not the accused spouse. *See Trammel v. United States*, 445 U.S. 40, 53 (1980); *United States v. Singleton*, 260 F.3d 1295, 1297 n.2 (11th Cir. 2001)(noting that the adverse spousal testimonial privilege "can be asserted only by the witness-

spouse"). That is, Knock did not have standing to assert this privilege during his trial and thus does *not* have standing to assert the same in this appeal. *See Trammel*, 445 U.S. at 53. The standing to assert that privilege and any violation thereof was held by Naomi, the testifying spouse, and *not* a party to this appeal.

The district court did not err in denying the confidential marital communication on the ground the privilege does not protect communications "between husband and wife about crimes in which they are jointly participating." *United States v. Mendoza*, 574 F.2d 1373, 1381 (5th Cir. 1978).

D. The District Court Did Not Constructively Amend the Indictment.

The defendants argue that the district court constructively amended the indictment or, alternatively, that there was insufficient evidence to support the jury's verdict that there was an overt act in furtherance of the conspiracy in the Northern District of Florida. Specifically, they argue that the indictment stated that the conspiracy counts occurred "in the Northern District of Florida," and that the district court improperly broadened the indictment to include activities that occurred inside *or* outside the jurisdiction of the Northern District of Florida.

The text of the indictment shows that the government alleged the conspiracy to be "in the Northern District of Florida and elsewhere." This Court has upheld similar generally-worded criminal conspiracy indictments. *See United States v. Bascaro*, 742 F.2d 1334, 1348 (11th Cir. 1984)(holding an indictment sufficient that alleged a conspiracy occurred "within the Northern District of Florida, and elsewhere"). An indictment is sufficient if it informs the defendant of the charges against him and enables him to plead double jeopardy in the case of a future prosecution.

Neither defendant in this case could have been retried if found innocent by the jury without a violation of the double jeopardy clause.

In any event, viewed in the light most favorable in the government, the evidence supports a conclusion that there was an overt act in the Northern District of Florida. For example, there is record evidence that Nicholas Grenhagen, an individual who worked for the charged drug organization, met with Carl Lilley, an undercover Drug Enforcement Agency Agent posing to have several boatloads of marijuana to sell in the Spring of 1994, in Gainesville, Florida (a city within the Northern District of Florida). Additionally, the record indicates that there were several phone calls from unindicted co-conspirators relating to the sale of marijuana to DEA Agent Lilley in Gainesville, Florida. There was no error.

E. Admitting Madrid's Canadian Plea Agreement Was Not Error.

At trial, over Madrid's objection, the district court admitted the plea agreement which Madrid entered into in Canada. The four-page plea agreement referenced and contained four appendices, Appendices A through D. The last page of the plea agreement was signed by Madrid's Canadian attorney "as agent for Joseph Albert Madrid" but did not include a signature block for Madrid to sign. Appendix "A", the only Appendix Madrid disputes, was a statement of facts relating to the pleaded to offenses. It did not have any signature blocks, and Madrid thus did not sign it. The facts state in Appendix A summarized the plea to the Canadian drug conspiracy and was prepared by Canadian prosecutors relying upon reports gathered by Royal Canadian Mounted Police Officers.

On appeal, Madrid neither disputes the enforcement of

the plea agreement nor that the agreement contained four appendices. Instead, he argues that his Canadian attorney did not have authority to sign the plea agreement if the facts alleged in Appendix A were intended to have been deemed admitted. Madrid contends that Appendix A was the only Appendix that he did not sign, emphasizing that he did not intend for it to be part of the plea agreement. Madrid filed a declaration from his Canadian attorney stating that he had not intended the statement of facts to be a part of the final Canadian plea agreement. Although Madrid argued in the district court that the plea agreement was cumulative and contained no significant evidence which the jury had not already heard, he argues on appeal that Appendix A was inadmissible hearsay and it was an abuse of discretion for the district court to admit it at trial.

The government filed an affidavit by Theresa Brucker, the Canadian official who signed Madrid's plea agreement on behalf of the Canadian government, stating "If Albert Madrid had taken the position that he did not agree to facts set out in the statement of facts forming part of the plea agreement it would have been incumbent upon me as an officer of the court to so advise the sentencing judge, and to ask Albert Madrid's plea be struck and that matter be set down for trial."

The district court did not abuse its discretion in admitting the Canadian plea agreement. We need not decide whether Madrid's Canadian attorney was expressly authorized to sign the plea agreement if it included Appendix A because evidence presented in the district court suggests that Appendix A was an *essential* portion of the plea agreement. Put another way, if the statement of facts contained in Appendix A to the Canadian plea agreement was not intended to be part of Madrid's plea agreement, then the plea itself, according to Ms. Brucker, would not have been valid. Moreover, the lead investigator for the Royal Canadian

Mounted Police, as well as twenty-one other Royal Canadian Mounted Police Officers, testified as to the facts contained within Appendix A of Madrid's plea agreement.

Because of the overwhelming evidence presented in the lengthy criminal trial against Madrid, any error in admitting Appendix A of the plea agreement, if error at all, was harmless. *See United States v. De La Mata*, 266 F.3d 1275, 1300-01 (11th Cir. 2001)(finding harmless error in the improper admission of hearsay against a criminal defendant).

F. The District Court Did Not Abuse Its Discretion By Excluding The Testimony of Madrid's Mother.

Madrid sought to have his mother testify that the $25,000 she had paid to Madrid's defense attorney came from her bank account and a bank loan. The district court held the testimony was irrelevant. On appeal, Madrid argues that the district court abused its discretion by excluding that evidence. A review of the record shows that the government never contended Madrid was illegally transferring his money or used his own for unaccounted money to pay attorney's fees.

The district court did not abuse its discretion by excluding the testimony of Madrid's mother as irrelevant.

G. There is No *Apprendi* Error.

Knock and Madrid challenge their life sentences under *Apprendi* because the indictment did not charge and the jury did not find a particular quantity of marijuana involved in the alleged drug conspiracy. *See Apprendi v. New Jersey*, 530 U.S. 466 (2000). The Supreme Court decided *Apprendi*, after the jury's guilty verdict but *before* sentencing. The defendants argue that the district court "refused" to apply *Apprendi* principles, resulting in *per se* structural error not

subject to harmless error review. This Court has expressly rejected this structural error argument, holding that "*Apprendi* error does not require reversal of the sentence if that error is harmless." *United States v. Anderson*, 289 F.3d 1321, 1326 (11th Cir. 2002)(citing *United States v. Sanchez*, 269 F.3d 1250, 1272-75 (11th Cir. 2001)(en banc)). In view of the overwhelming record evidence of the massive drug conspiracy alleged in this case, no reasonable juror could have found the defendants guilty of conspiracy to possess with the intent to distribute marijuana from 1982 and 1996 without finding the minimum 1,000 kilograms threshold to impose a life sentence under 21 U.S.C. §§ 841(b)(1)(A)(vii), 846. *See Anderson*, 289 F.3d at 1328-29 (holding any *Apprendi* error to be harmless for defendant indicted and convicted without regard to drug quantity prior to the *Apprendi* decision but sentenced after that decision). Therefore, there was no error in either Knock's or Madrid's sentence.

AFFIRMED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
Gainesville

[File-Stamp]
[March 16, 2001]

UNITED STATES OF AMERICA,

Case # 1:94CR1009-004(S)

vs.

Defendant's Attorney:
Randolph Daar (Retained)
San Francisco, CA

Albert Thomas Madrid

_____/

JUDGMENT IN A CRIMINAL CASE

The defendant was found guilty of Count 1 of the Superseding Indictment on May 30, 2000. Accordingly, IT IS ORDERED that the defendant is adjudged guilty of such count(s) which involve(s) the following offenses(s):

TITLE/SECTION/NUMBER
21 USC 841(a)(1), 841(b)(1)(A)(vii) and 846

NATURE OF OFFENSE
Conspiracy to Possess With Intent to Distribute Marijuana

DATE OFFENSE CONCLUDED
April 17, 1996

COUNT
One

The defendant is sentenced as provided in the following

pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1983, including amendments effective subsequent to 1984, and the Sentencing Guidelines promulgated by the U.S. Sentencing Commission.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution costs and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No. 549-80-0655
Defendant's Date of Birth: 4/15/49
Deft's U.S. Marshal No.: 28765086

Date of Imposition of Sentence
March 1, 2001

Defendant's Residence Address:
5706 Blue Bell Drive
W. Vancouver, Canada
Defendant's Mailing Address:
Same as above

/s/
MAURICE M. PAUL, SENIOR
UNITED STATES DISTRICT JUDGE

Entered on Docket: 3-16-01 by L.T. March 16, 2001

Rules 58 & 79(a)FRCP or 32(d)(1) & 56 FRCRP
Copies mailed to: Hankinson, Daar, USM, USPO, Finance

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of Life.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ at _____ with a certified copy of this judgment.

_____

UNITED STATES MARSHAL

By: _____

Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 5 years.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from custody of the Bureau of Prisons.

While on supervised release, the defendant shall not commit another federal, state or local crime and shall not possess a firearm, ammunition, or destructive device as defined in 18 U.S.C. § 921.

For offenses committed on or after September 13, 1994: The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the

probation officer.

STANDARD CONDITIONS OF SUPERVISION

The defendant shall comply with the following standard conditions that have been adopted by this court.

1. The defendant shall not leave the judicial district without the permission of the Court or probation officer.

2. The defendant shall report to the probation officer as directed by the Court or probation officer and shall submit a truthful and complete written report within the first five days of each month.

3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.

4. The defendant shall support his or her dependents and meet other family responsibilities.

5. The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.

6. The defendant shall notify the probation officer 10 days prior to any change in residence or employment, unless otherwise directed by the probation officer.

7. The defendant shall refrain from the excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician.

8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

9. The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.

10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.

11. The defendant shall notify the probation officer within 72 hours of being arrested or questioned by a law enforcement officer.

12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the Court.

13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

14. If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervision that the defendant pay any such fine or restitution in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

ADDITIONAL CONDITIONS OF SUPERVISED RELEASE

The defendant shall also comply with the following additional conditions of supervised release:

The defendant shall not own or possess a firearm, dangerous weapon or destructive device.

The defendant shall pay any fine that remains unpaid at the commencement of the term of supervised release in monthly installments of not less than $300.00, to commence no later than three months after his release from imprisonment.

The defendant shall provide complete access to financial information, including disclosure of all business and personal finances, to the United States Probation Office.

CRIMINAL MONETARY PENALTIES

All criminal monetary penalty payments, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program, are to be made to the Clerk, U.S. District Court, unless otherwise directed by the Court. Payments shall be made payable to the Clerk, U.S. District Court, and mailed to 111 N. Adams St., Suite 322, Tallahassee, FL 32301-7717. Payments can be made in the form of cash if paid in person.

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth in the Schedule of Payments. The defendant shall pay interest on any fine or restitution f more than $2,500, unless the fine or restitution is paid in full before the fifteenth day after the date of judgment, pursuant

to 18 U.S.C. § 3612(f). All of the payment options in the Schedule of Payments may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

SUMMARY

Special Monetary Assessment	Fine	Restitution
$100.00	$4,000,000.00	

SPECIAL MONETARY ASSESSMENT

A special monetary assessment of **$100.00** is imposed.

FINE

A fine in the amount of **$4,000,000.00** with interest is imposed. No restitution imposed.

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) special monetary assessment; (2) non-federal victim restitution; (3) federal victim restitution; (4) fine principal; (5) costs; (6) interest; (7) penalties in full immediately.

The defendant must notify the court of any material changes in the defendant's economic circumstances, in accordance with 18 U.S.C. §§ 3572(d), 3664(k) and 3664(n). Upon notice of a change in the defendant's economic condition, the Court may adjust the installment payment schedule as the interests of justice require.

Special instructions regarding the payment of criminal

monetary penalties pursuant to 18 U.S.C. § 3664(f)(3)(A):

If this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. In the event the entire amount of monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due. The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

STATEMENT OF REASONS

The court adopts the factual findings and guideline application in the presentence report except:

As to Paragraphs 14 and 17 the Court determined that the defendant was not involved in any of the pre-Fall 1987 drug loads.

As to Paragraph 119 the Court determined that a two level upward departure was warranted, increasing the defendant's total offense level to 43.

Guideline Range Determined by the Court:

Total Offense Level: 43
Criminal History Category: 1
Imprisonment Range: Life
Supervised Released Range: 5 years
Fine Range: $25,000 to $4,000,000.00

This sentence is an upward departure based on the nature of the defendant's conduct and the large quantity of drugs involved in the offense.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
GAINESVILLE DIVISION

UNITED STATES OF AMERICA,

CASE NO. 1 94cr1009 MMP

vs.

JOHN KNOCK and
ALBERT MADRID,

[File-stamp]
[January 23, 2001]

Defendants.
_____/

ORDER

This matter was previously before the Court for the sentencing of John Knock and Albert Madrid. At the sentencing hearing, however, the Court indicated to the parties that further briefing would be required on various issues involving the Supreme Court's opinion in Apprendi v. New Jersey, 120 S.Ct. 2348 (2000). The parties have submitted a series of memoranda, and the matter is now ripe for adjudication on the issues raised by Apprendi.

The defendants Knock and Madrid were charged in three substantive counts in a Superceding Indictment (doc. 414). Count One charges that they "did knowingly and willfully combine, conspire, confederate and agree with each other and with others to possess with the intent to distribute the controlled substance marijuana, in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(A)(vii)" all in violation of the conspiracy section, 21 U.S.C. § 846. Count Two charges that they did knowingly and willfully combine, conspire, confederate and agree with each other and with others to import into the

United States from a place outside thereof the controlled substance marijuana, in violation of the conspiracy provision 21 U.S.C. § 963. Count Three charges that they "did knowingly and willfully combine, conspire, confederate and agree with each other and with others to transport funds from a place in the United States to a place outside the United States, which activity was to be conducted with the intent to promote the carrying on of a specified unlawful activity, in violation of Title 18, United States Code, Section 1956(a)(2)(A)" all in violation of the conspiracy provision, 18 U.S.C. § 1956(h). Count Four is a forfeiture count.

As the above language indicates, Counts One and Two of the Superseding Indictment referred to particular penalty provisions of the various criminal statutes but did not list the specific amounts of drugs necessary to trigger each provision. For example, Count One charged that 21 U.S.C. § 841(b)(1)(A)(vii) is the applicable penalty provision for the amount of drugs involved in Count One, but does not expressly state any amount of drugs. However, 21 U.S.C. § 841(b)(1)(A)(vii), only applies to a defendant whose offense involves 1000 kilograms or more of marijuana. Thus, although the amount of drugs is not expressly alleged in the indictment, it is implicitly alleged by the reference to the particular penalty provision. The same is true of Count Two, which refers to 21 U.S.C. § 960(b)(1)(G), which requires that 1000 kilograms of marijuana be involved in the violation.

The defendants did not object to the Superseding Indictment on the basis that drug amounts or money amounts under Count Three should have been set out in the Superseding Indictment. Also, in their sentencing memoranda the government and the defendants agree that neither side challenges the Superseding Indictment on this basis now.

The defendants were eventually brought to trial on the

above charges. At the trial, the government offered evidence of various shipload-sized deliveries of marijuana, each of which clearly contained far more than 1000 kilograms of marijuana. The defendants did not offer evidence that the shiploads were somehow less than 1000 kilograms and did not even challenge the existence of the shiploads. Instead, they relied on a theory that the activity charged in the Superseding Indictment did not come under United States jurisdiction because it occurred only in Canada.

Prior to jury instruction, the parties were given an opportunity to submit proposed jury instructions and were also given an opportunity to object to the court's final version of the instructions before they were read to the jury. The defendants did not request an instruction regarding the specific amount of drugs or laundered money involved and did not object on this basis to the court's final instructions. Thus, no instruction regarding the specific amount of drugs was read to the jury regarding Counts One and Two, and no instruction regarding the amount of laundered money involved in Count Three was read to the jury.

Additionally, a proposed verdict form was part of the court's final jury instructions, and the parties were allowed to review and object to the verdict form. The verdict form did not require the jury to find the amount of drugs or laundered money beyond a reasonable doubt. The defendants did not raise any objection to the verdict form on this basis.

John Knock was found guilty on all three counts, and the probation department prepared a Presentence Report (PSR) which recommended application of the penalty provisions listed in the indictment which resulted in a recommended sentence of life imprisonment. Albert Madrid was found guilty on Count One and acquitted of Counts Two and Three, and his PSR recommended application of the penalty provision listed in Count One and a sentencing range of 324-

405 months plus an upward departure. Prior to sentencing, however, the defendants objected to the PSR on Apprendi grounds.

With regard to Apprendi, the defendants argue that, first, Apprendi requires that defendants only be sentenced for Count One under 21 U.S.C. § 841(b)(1)(D), which does not require a finding of drug quantity, and which carries a 5-year maximum. Additionally, John Knock contends that the factual findings which underlay the determination of his Guidelines range for money laundering should have been made by the jury, according to Apprendi. In essence, he argues that no Guidelines factor, including enhancements, can be applied by the judge at sentencing if the application requires any factfinding. Thus, after some recalculation, Knock concludes that the maximum Guidelines range he could receive is based on an offense level of 24.

The recent Eleventh Circuit case of United States v. Nealy, 232 F.3d 825 (11th Cir. 2000) squarely addresses both of the above arguments. First, in footnote three, the Nealy court holds that "[t]he Sentencing Guidelines are not subject to the Apprendi rule. Apprendi, 120 S.Ct. At 2366 n. 21. The Guidelines allow the sentencing judge to consider relevant conduct to determine overall drug quantity in calculating the base offense level. U.S.S.G. § 181.3(A)." Thus, the argument regarding application of the Guidelines must be rejected, and Knock can point to no possible Apprendi error in the recommendation of the PSR with regard to Count Three. See also U.S. v. Ulloa-Porras 2001 WI. 15527 (10th Cir. Jan. 8, 2001); Edwards v. United States, 523 U.S. 511, 515 (1998)(noting difference between challenges in sentence in excess of the statutory maximum and sentence within statutory range); U.S.S.G. § 5G1.1 (providing that Guidelines sentence may not exceed statutory maximum).

Turning to Counts One and Two, the Court notes that

Nealy dictates that the failure to submit the drug amount to the jury must be reviewed under the harmless error standard, even if the defendant preserves all objections regarding Apprendi. In Nealy, the defendant did more than Knock and Madrid to preserve his Apprendi objections. Before jury instructions were given, he requested that a drug-quantity instruction be read. Additionally, before sentencing, he objected to a sentence based on drug quantity not found by the jury beyond a reasonable doubt. Despite the fact that Nealy had thus preserved his objections and despite the fact that the Eleventh Circuit recognized that an error had occurred based on United States v. Rogers, 228 F.3d 1318 (11th Cir. 2000), the court applied the harmless error standard and refused to overturn Nealy's sentence. The Court stated:

> Because Defendant was sentenced under § 841(b)(1)(A) and because his 32-year sentence exceeds the 30-year statutory maximum for each count, an error has occurred.
>
> But failure to submit the issue of drug quantity to the jury is, in this case, harmless error that does not require reversal. Apprendi did not recognize or create a structural error that would require per se reversal. United States v. Swatzie, 228 F.3d 1278, 1283 (11th Cir. 2000). And a constitutional error is harmless if "it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." Neder v. United States, 527 U.S. 1, 119 S.Ct. 1827, 1838, 144 L.Ed.2d 35 (1999) (applying harmless error

> analysis to failure to submit issue of materiality to jury); see also Swatzie, 228 F.3d at 1283 (noting that "error in Neder is in material respects indistinguishable from error under Apprendi"). Harmless error is appropriate because it "block(s) setting aside [sentences] for small errors or defects that have little, if any, likelihood of having changed the result of the trial." Neder, 119 S.Ct. At 1839 (quoting Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 827, 17 L.Ed.2d 705 (1967)). We must affirm Defendant's sentence if the record does not contain evidence that could rationally lead to a contrary finding with respect to drug quantity. See Neder, 119 S.Ct. at 1837.

The Nealy panel then reviewed the evidence submitted at the trial and concluded that even had the quantity issue been submitted tot he jury, the record did not contain evidence that could rationally lead to a contrary finding with regard to drug quantity. The panel stated:

> An officer testified at trial that Defendant at the scene admitted that the cocaine base was his. Defendant was convicted for this possession (count II); and, given the undisputed evidence about drug quantity, no reasonable jury could have rationally concluded that Defendant was guilty of the substantive offense-possession, with intent to distribute of the cocaine base in his backpack-but that the amount of cocaine possessed was less than 5 grams.

Accordingly, the Nealy court found that "failure to submit drug quantity to the jury was harmless beyond a reasonable doubt." Nealy, 232 F.3d at 830.

In the instant case, the defendants did not dispute the fact that the only evidence submitted to the jury was of shipload-sized loads of marijuana clearly greater than 1000 kilograms. Thus, as in Nealy, no reasonable jury could have rationally concluded that Defendants were guilty of the substantive offenses-conspiracy to possess with intent to distribute marijuana or conspiracy to import marijuana - without also concluding that the amount of marijuana possessed was more than 1000 kilograms. Thus, under the logic of Nealy, the prior error of this court to instruct the jury regarding drug amounts and the prior error of this court in failing to require the jury to find-those drug amounts beyond a reasonable doubt constitute errors which are harmless beyond a reasonable doubt.[1] Thus, sentencing the defendants as the PSR recommends would not violate Apprendi in this case.

Two recent cases issues [*sic*] by the Eleventh Circuit do not affect this analysis. U.S. v. Gerrow, 232 F.3d 831 (11th Cir. 2000); U.S. v. Shepard, 2000 WL 1839206 (11th Cir.

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[1] The court determines that a sentencing court properly applies the harmless error rule when examining its own prior errors. Fed.R.Crim.P. 52(a) ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded," and Fed.R.Crim.P. 54(a) (the rules of criminal procedure, including Rule 52(a), "apply to all criminal proceedings in the United States District Courts" as well as to the Courts of Appeal and the Supreme Court). Fed.R.Crim.P. 52(a) was relied upon by the Supreme Court in Neder, and the Eleventh Circuit relied heavily upon Neder. Thus, pursuant to Rule 54(a) and Rule 52(a), this court is required to disregard any error which does not affect substantial rights. Here, although the defendants argue that their freedom is obviously a substantial right, they fail to address the fact that, pursuant to Nealy, the error did not "affect" those rights because no rational jury would have held otherwise even if the drug quantity had been submitted.

2000), are different cases than that before the Court. In these cases, the Eleventh Circuit applied a different kind of harmless error analysis that seems to have been created especially for post-Apprendi cases. Both panels found that the failure to include drug amounts in the indictment and to submit the amount issue to the jury were error under Apprendi and Rogers. Additionally, Shepard found that the defendant had preserved the error by objecting before sentencing. Nevertheless, both cases allowed the convictions and the sentences to stand because the actual sentences, although given out under 21 U.S.C. § 841(b)(1)(A), were actually less than the 20 year maximum under 21 U.S.C. § 841(b)(1)(C). Thus, Shepard concluded that "[b]ecause Shepard's sentence falls within the authorized range, we find no prejudice", and Gerrow concluded that "there is no error, plain or otherwise, under Apprendi where the terms of imprisonment is within the statutory maximum set forth in § 841(b)(1)(C) for a cocaine offense without regard to drug quantity." Because these cases involved actual sentences below the maximum for the catch-all provision of subparagraph (C), the panels did not have to confront the thorny issues confronted directly in Nealy and so Nealy provides more relevant direction in the instant case.

Various other circuits have taken the same approach as in Nealy. E.g., U.S. v. Terry, 2001 WL 13156 (1st Cir. Jan. 10, 2001)("We ask what prospects there were that the submission of the questions -- whether the trigger drug quantity amounts was met -- to the jury would have resulted in a different outcome, keeping in mind the higher standard of proof required before a jury. Given the trial evidence about the quantity of drugs, there was no prejudice to Terry. In each of the three transactions in 1997, Terry directly sold Bennett, a cooperating witness, far more than 50 grams of cocaine base in controlled buys."); United States v. Anderson, 2001 WL 10637 (8th Cir. Jan. 5, 2001) (Because

no rational jury could have found appellants guilty of the substantive offense, yet at the same time found that the amount of methamphetamine the conspiracy sought to produce was less than five grams, we hold the Apprendi error to be harmless beyond a reasonable doubt.")(citing Nealy, 232 F.3d at 830); United States v. Nance, 2000 WL 1880629 (7th Cir. Dec. 29, 2000)(concluding that harmless error analysis under Neder must be applied even if the defendant preserves his Apprendi objection and holding "If it is clear beyond a reasonable doubt that a properly worded indictment and a properly instructed jury would have found Wendell guilty absent this error, then we cannot say that the error was so serious that it requires us to set aside the judgment. If this jury was going to convict Wendell at all -- which is plainly did -- there is simply no way on this record that it could have failed to find that he was conspiring to distribute 5 grams or more of crack cocaine.")

The court notes, however, that there remains some uncertainty among the circuits and even within individual circuits on the issue of whether Apprendi errors can ever be harmless. For example, compare the above cases with United States v. McWaine, 2001 WL 30615 (5th Cir. Jan. 12. 2001); United States v. Meshack, 225 F.3d 556, 577-58 [*sic*] (5th Cir. 200) ("plain error analysis ... does not allow us to uphold Meshack's life sentences because those sentences are longer, at least in theory, than his unchallenged concurrent sentence of 360 months for a different crack cocaine possession count. Thus, in light of the government's concession that Apprendi applies, we must vacate Meshack's two life sentences and remand to the district court for appropriate proceedings."); and United States v. Nordby, 225 F.3d 1053 (9th Cir. 2000)(applying the harmless error standard from Neder but finding that defendant had shown that the error was not harmless because he vigorously contested at trial the amount of marijuana plants grown on

his land). Also, it should be noted that a subsequent panel of the Eighth Circuit, in U.S. v. Yakle, 2001 WL 25719 (8th Cir. Jan. 11, 2001) seems to reach a different result from that in Anderson, decided only 6 days earlier, without even referring to either Anderson or Nealy, which was cited favorably by the Anderson panel.

Despite the ongoing debate among the circuits, however, the Nealy decision is binding on this Court and covers the situation before the Court. According it is hereby

ORDERED AND ADJUDGED

1. The Defendants' objections to the PSR which relate to the application of Apprendi are overruled.

2. This matter is set for final sentencing hearing for defendant Madrid at 1:00 p.m. on January 30, 2001, and for defendant Knock at 2:00 p.m. on January 30, 2001. The issues resolved by this Order will not be re-argued at the final sentencing hearing, but all Apprendi related objections raised by the parties thus far will be considered preserved.

DONE AND ORDERED this 23rd of January, 2001

/s/ Maurice M. Paul
Maurice M. Paul, Senior District Judge

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 01-10894

[File-Stamp]
[July 31, 2003]

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOHN RICHARD KNOCK,
a.k.a. John Richard Phillips,
a.k.a. Mickey Ryan,
a.k.a. Michael Philip Ryan,
ALBERT THOMAS MADRID,

Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Opinion _____, 11th Cir., 19 __, ___ F.2d ___).

Before: BIRCH, HULL and RONEY, Circuit Judges

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Paul H. Roney
UNITED STATES CIRCUIT JUDGE

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution, Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Constitution, Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Constitution, Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

PLEA AGREEMENT

WHEREAS Albert Joseph Madrid (hereinafter referred to as "the Accused"), as represented by his counsel David Gibbons, has entered into plea negotiations with agents of the Attorney General of Canada with respect to charges he faces in Vancouver, British Columbia under subsection 4(2) and sections 19.1 and 19.2 of the Narcotic Control Act as set out in Statement of Facts appended hereto as Appendix "A";

AND WHEREAS, during the course of these negotiations, agents for the Attorney General of Canada have given consideration to the following factors;

a. the sufficiency of the evidence and the public interest in proceeding to prosecute the Accused on the above-referenced charges;

b. the public's interest in the effective and consistent enforcement of the criminal law;

c. the Accused's background, age, intelligence, physical and mental health and his alleged degree of responsibility for the offence;

d. the seriousness of the offence and the likely length and expense of court proceedings;

e. the cooperation of the Accused in consenting to the surrender of the proceeds of crime identified herein and facilitating in the transfer of title of same to the appropriate authorities in Canada and Singapore;

THEREFORE THE ATTORNEY GENERAL OF

CANADA agrees to the following and states that:

a. a guilty plea will be accepted from the Accused to one count of possession for the purposes of trafficking in 6 tons of hashish; one count of possession of the proceeds of crime in relation to a 1992 Range Rover, and 1 count of laundering approximately $17 million in proceeds realized from the sale of the 1992 hashish load.

b. An appropriate range of sentence in this case is 6 to 8 years on each count, to be served concurrently;

c. counsel for the Attorney General of Canada will inform the sentencing judge of the following:

   i. the existence of this Agreement;

   ii. the full nature and extent of the Accused's activities with respect to this case, as set out in the Statement of Facts attached hereto as Appendix "A";

   iii. the full nature and extent of the Accused's cooperation with the Attorney General of Canada and the RCMP;

   iv. any other information which may be in the possession of the Attorney General which is relevant to the Accused's sentence.

d. the Attorney General of Canada will not commence further proceedings against the Accused under sections 4, 5, 19.1 or 19.2 of the Narcotic Control Act or section 465 of the Criminal Code in respect

of the Accused's involvement in the importation or distribution of the cannabis products imported into British Columbia for the calendar years 1991 to 1993 inclusive.

AND THE ACCUSED ALBERT JOSEPH MADRID agrees to the following and states that:

a. he will enter a guilty plea to the 3 counts described herein;

b. an appropriate range of sentence in this case is 6 to 8 years on each count, to be served concurrently;

c. he has possession and control of the monies currently on deposit in account # 504-11028-01 with the Banque Nationale de Paris in Singapore, to the credit of John Byrne, and that the said monies represent the proceeds of crime within the meaning of that term in section 462.3 of the Criminal Code;

d. he will facilitate the transfer of the monies in account #504-11028-01 with the Banque Nationale de Paris in Singapore to the Accountant General of Singapore by executing the documents appended hereto as "Appendix B", "C" and "D";

e. he is the possessory owner of a 1992 Land Rover provided to him by George Lawrence "Larry" Burden in 1992; she said vehicle is the proceeds of crime within the meaning of that term in section 462.3 of the Criminal Code; and he will do all things necessary and within his power to facilitate the transfer of title of that vehicle to the Attorney General of Canada;

f. in the event that Canadian law enforcement agencies become aware of property that is proceeds of crime within the meaning of that term in section 462.3 of the Criminal Code that relates to the importation or distribution of cannabis products imported into British Columbia for the calendar years 1991 to 1993 inclusive, whether located in Canada or in other jurisdictions, and at any time prior to the serving by him of his sentence and parole commitments, and in which the Accused consents to the surrender of said property, and agrees to facilitate the transfer of same to Her Majesty the Queen in Right of Canada.

g. he has received independent legal advice from his counsel regarding his rights and responsibilities pursuant to this Agreement.

IT IS UNDERSTOOD by the Parties to this Agreement that the sentence to be imposed upon the Accused is within the sole discretion of the sentencing judge, and that the Attorney General of Canada has not given the accused any promises or assurances as to what sentence he will receive.

AND IT IS UNDERSTOOD by the Parties that this Agreement is limited to the Attorney General of Canada and cannot bind Provincial prosecuting authorities;

AND IT IS FURTHER UNDERSTOOD by the Parties to this Agreement that no additional promises, agreements or conditions have been entered into other than those set forth in this Agreement.

DATED AT the City of Vancouver, in the Province

of British Columbia, this 22nd day of July, 1996.

/s/_____

Counsel for the Attorney
General of Canada

/s/_____
Witness

DATED AT the City of Vancouver, in the Province of British Columbia this 22 day of July, 1996.

/s/_____
David Gibbons as agent
For Albert Joseph Madrid

/s/_____
Witness

By the signing of this Agreement by his counsel David Gibbons, Albert Joseph Madrid acknowledges receipt of a copy of same on the 22 day of July, 1996.

Appendix "A"

STATEMENTS OF FACTS: ALBERT MADRID

1. In 1982 Mr. Duboc was approached in France by a Canadian friend, Jim Kennedy, to provide financial assistance to him vis. the structuring of joint ventures and other business endeavors. In the course of time it became apparent to Mr. Duboc that these endeavors involved the purchase and sale of illegal drugs; hashish at the kilogram level was being imported by air into Quebec. After the first few importations, the organization realized that there was a large market for hashish in Quebec. In the words of Mr. Duboc, Quebec could consume as much hashish as the organization could import. The business was expanded and by 1984 it was generating returns of approximately $10 million.

2. Mr. Duboc advised that because of the severe penalties in the east coast for hash importing, they decided to import into British Columbia, where the penalties were less, and transport the drugs cross-country to Quebec or into the U.S.

3. Mr. Madrid met Sonia Vacca in 1989. Initially he was responsible for supervising the importation of drugs into British Columbia and the distribution of same to the east. In the early stages the profits from the business had been couriered to Europe and deposited into banks in Luxembourg. However, as that country's banking laws tightened, a business decision was made to courier the money to Singapore.

4. By 1989 Ms. Vacca had established herself as a chief courier; she supervised a team of individuals who transported suitcases of money to Singapore. This currency

routing change meant that Mr. Madrid's responsibilities expanded in Vancouver so that in addition to supervising the importation and distribution of the drugs, he became responsible for receiving the money from personnel in Montreal and Toronto and supervising the transport of the profits to Singapore by Ms. Vacca and her team. He was assisted in this aspect of the business to an unidentified degree by Kenneth Cowles. On at least one occasion Mr. Madrid accompanied Ms. Vacca and others to Singapore, took possession of all the money upon their arrival, and paid Ms. Vacca $5,000.

5. The business was so successful that in all Ms. Vacca estimates that she made 39 trips to Singapore carrying approximately $2 million per trip between 1989 and 1993; the initial "wrinkles" were eventually worked out and the operation flowed smoothly. Hashish was purchased in Pakistan, loaded into a "mothership" and delivered to a point off the Canadian shore. Mr. Madrid was responsible for hiring an "offload crew", which met the mothership, took receipt of the drugs, and delivered them to shore, either to the mainland or to Vancouver Island.

6. By the late 1980's, the business was importing between 30 to 40 tons of hash, so it became necessary to have secure locations in British Columbia to store drugs and money; these are referred to in the vernacular as "stash houses". In 1990 Mr. Madrid located and recommended to Mr. Duboc that the business purchase a residence in Courtenay which could be used for that purpose. Other such residences were purchased in Qualicum and Gibsons. A fourth property was purchased near Vernon on the route to eastern Canada.

7. Mr. Madrid oversaw the arrival and offload into Canada of approximately 25,000 to 30,000 kilograms of hashish in

1991; the offload crew, which included George Lawrence "Lorry" Burden, was selected by Mr. Madrid. Mr. Madrid arranged for Ms. Vacca and another person, Chris Horn, to "live" in the Courtenay residence just prior to receipt of that years product, so as to give it some semblance of occupation.

8. Over the Christmas holiday in 1991, Mr. Madrid met with Mr. Duboc in France for a skiing vacation. He advised Mr. Duboc that a Vancouver resident named "Lorry" wanted Mr. Duboc to invest with him in a wood chip business; an ocean-going vessel would be purchased which could be used in the drug end of the business, and could also be used legitimately in a woodchip business involving Japanese customers, it was agreed that such a business would fit in well with the organization's hashish business.

9. The use of Mr. Burden as the 1992 offload contractor was also briefly discussed; Mr. Madrid advised that Lorry had barges and seagoing tugs and had been involved in the organization's 1991 offload of hashish, during which he had worked very hard for minimal compensation and had performed 'admirably'.

10. Mr. Duboc could see the potential for such a proposal and indicated to Mr. Madrid that he would like to explore the matter further. As a result, he spoke with Mr. Madrid and Mr. Burden several times in early 1992; these conversations were always conducted using pay phones. Initially Mr. Duboc spoke with Mr. Madrid, who would then put Mr. Burden on the phone. If Mr. Burden digressed from the subject or spoke too freely, Mr. Madrid would take the receiver and wrap up the conversation using the usual guarded language.

11. During that period of time, Mr. Duboc began wire-transferring funds to Mr. Burden's bank in Richmond, B.C.; the monies were intended to fund the purchase of a large ocean-going vessel for the woodchip/drug business. Mr. Duboc provided approximately $1.5 million U.S. by means of wire transfer, using fictitious corporate names and routing the money from Singapore through Bahrain and New York.

12. One of Mr. Madrid's responsibilities during the early months of 1992 was to oversee the expenditure of the monies intended for the motor vessel. By March the conversations between Mr. Madrid and Mr. Duboc turned to plans for the 1992 load. Mr. Duboc sent Mr. Burden a further $2 million U.S. using the same wire-transfer arrangements; he advised that although it was unusual to advance money to the offload contractor, he relied on Mr. Madrid's expertise in the matter and his recommendation for Mr. Burden. Mr. Madrid was responsible for overseeing the spending of the money by Mr. Burden and he was also expected to coordinate the 1992 offload and the subsequent transport of the hashish to eastern Canada and to supervise the collection of the profits. Mr. Madrid and Mr. Cowles described by Mr. Duboc, in a draft document prepared by him with his American attorney, as 'contract labor".

13. Mr. Burden proceeded to put together an offload crew; the preparations for receipt of the 1992 load were overseen by Mr. Madrid. Mr. Cowles' involvement was described as a "bean counter" or accountant. Chris Turner worked closely with Mr. Burden and Mr. Madrid, and Eric Krenbrink and Robert Watt took part in the operation. Everett Lightfoot, a local private investigator, was hired by Mr. Burden to deal with security.

14. The total of the 1992 load, being 39 or 40 tons of hash,

was successfully offloaded into British Columbia in June, 1992, and distribution began. Ten tons were immediately provided to purchasers from the east, and five additional tons was sold. Six tons was transported to a warehouse on Mitchell Island in the Fraser River.

15. Following three days of surveillance, which disclosed meetings between Mr. Madrid and Mr. Burden, the police attended at the Mitchell Island warehouse on July 16, 1992 and arrested Mr. Burden, Mr. Madrid, Mr. Cowles, Mr. Turner, Mr. Krenbrink, Mr. Lightfoot and Mr. Watt, approximately 6 tons of hashish was seized from a truck which had just left the warehouse, and all seven individuals were subsequently charged with possession for the purpose of trafficking in hashish. Mr. Watt entered a guilty plea to his charge in August, 1993 and was sentenced to 10 months; his role in the operation was defined as a "truck driver". Mr. Turner and Mr. Krenbrink entered guilty pleas in September, 1995 and were sentenced to 8 and 6 months respectively; they were labourers on the offload crew. Mr. Cowles, whose involvement in the business appears to have ended after his arrest, entered a guilty plea to the same charge, as well as a charge of money laundering, in June, 1995, and was sentenced to 6 years. He was described as an "accountant" or "bean counter". Mr. Lightfoot entered a guilty plea to a section 4(2) charge in June, 1996 and was sentenced to 4 months.

16. Following Mr. Madrid's arrest on July 16, 1992, his rental vehicle was searched and a ringed notebook containing several pages of notations and mathematical calculations was seized. Certain of the notations referred to "steel head", being the Courtenay property. Mr. Cowles had a similar "ledger" that covered only a small portion of the shipment, whereas Mr. Madrid's calculations were exhaustive and

accounted for the movement of drugs from July 3, 1992 to the date of his arrest. These calculations were detailed and consistent with the calculations normally found in the possession of person involved in the drug trade.

17. Mr. Duboc advised that as an off-load contractor, Mr. Burden would have been paid between 22% and 25% of the profits made from the importation, either in cash or hashish.

18. Mr. Duboc had, by the time of the arrests, received the majority of the money from the 15 tons that had been distributed prior to the arrest on July 16, 1992. He described the arrests in Vancouver as being a severe setback for the business.

19. Because the usual distribution scheme was suspected of being compromised by the arrests, the remaining hashish was transported to Quebec by associates of Mr. Burden.

20. Mr. Madrid contacted Mr. Duboc and advised him that the rest of the load was safe and in the hands of Mr. Burden's associates, who had transported the hashish to Quebec by means of rental vehicles. The organization was repaid about 15 of the 20 tons.

21. Following the arrests in 1992 the RCMP Vancouver Drug Section commenced an investigation into the activities of Mr. Burden and others; during that time surveillance was conducted and Mr. Madrid continued to be observed in the company of Mr. Burden.

22. In late 1992, Marshall Way was hired by the organization to oversee the collection of the money from the 1992 load in Toronto. In late January, 1993 he moved to Vancouver to continue with the transhipment of the funds to

Singapore and met with Mr. Madrid, who advised Mr. Way of his role and responsibilities and asked him what he required to get the job done. During the conversation, Mr. Madrid advised Mr. Way that he would be getting a "helper", and another meeting was set for a few days hence.

23. The second meeting between Mr. Madrid and Mr. Way took place at the same office, where Mr. Way was introduced to Julie Roberts, who was identified by Mr. Madrid as Cathy Fogarty. Ms. Roberts was instructed to acquire an apartment and a fax/answering machine; Mr. Way had a set of keys for the apartment and received messages intermittently from Mr. Duboc.

24. At a third meeting with Mr. Madrid, Mr. Way was told how the money pick-ups would be handled. Mr. Cowles was present in the office but did not participate in the meeting.

25. Further to Mr. Madrid's instructions, Mr. Way met a woman in the Oakridge mall and received a set of keys for a vehicle which had large quantity of money in the trunk. As instructed, he drove to Ms. Robert's apartment, unloaded the bags of money, and returned the car and the bags to the mall parking lot.

26. Mr. Way advised that he made approximately 4 or 5 pickups between January and June, 1993 totally about $10 million. The money had been counted and Bundled by the time he received it; upon notification that the money couriers had arrived in Vancouver, he prepared the money for transhipment to Singapore. During the period of time Mr. Way and Ms. Roberts were closely monitored by Mr. Madrid.

27. The business was concluded in early summer, 1993 and Ms. Roberts and Mr. Way, who was paid by Mr. Madrid, returned to the U.S.

28. In late 1993 the business took a downturn. Ms. Vacca was arrested in the U.S. on charges of conspiracy to import drugs into North America; she provided evidence which led to the arrest of Mr. Duboc in Hong Kong in early 1994 in the same charges, and to the arrest of Matthew Martenyi in San Francisco. Mr. Duboc, facing a lengthy period of incarceration in Florida, divested himself of approximately $130 million in cash and assets in favor of the U.S. government, and provided information which led the RCMP to commence an investigation into Mr. Burden in respect of assets acquired by him with the monies he earned as the 1992 offload contractor.

29. On May 17, 1994 warrants authorizing the searches of the Courtenay property, the Gibsons property and the Qualicum property were obtained and executed and the following relevant information was obtained:

a. The Gibsons property seemed to have been more recently occupied than the other two residences. A discarded prescription bottle dated January 15, 1990 and prescribed to "Al Madrid" was located;

b. Fingerprints were lifted at three properties by members of the RCMP identification Section and were examined. Mr. Cowles' fingerprints were found at the Qualicum property, and Mr. Madrid's fingerprints were found at both the Qualicum and Gibsons properties .

c. Rollers of the type used to move heavy objects, radio surveillance and night vision equipment were located

at the Courtenay residence.

30. On June 28, 1994 a Search Warrant was executed on Mr. Burden's residence and his office premises; two plastic garbage bags were buried alongside two bags containing $500,000 in Canadian $100 bills and $40,000 in U.S. $100 bills in the back yard of the residence. All the bags and contents were seized; the garbage bags contained several thousand documents, some of which related to Mr. Madrid.

31. Also seized from the residence was an invoice dated April 15, 1993 from Lens and Shutter camera shop; it was in Mr. Madrid's name and the address was shown as "5th Floor, 195 Alexander Street, Vancouver". The invoice was for a $2,835.11 video camera and was paid for in cash.

32. A Cantel cellular invoice covering the period ending April 23, 1994 was located in the material seized from Mr. Burden's Coastal Forest products' offices; it is related to number (604)889-3852, which was registered to Northgate Industries Ltd. The user was shown to be one Gary Bolderson but on the front of the invoice was handwritten, "OK MADRID CANCEL".

33. A March 14, 1994 fax sent from Paine Edmonds to Coastal Forest products was seized from the offices of Coastal Forest Products; it was entitled "RELEASE and INDEMNITY" and represented an agreement between Gary Bolderson and John Dickie on the one hand, and Mr. Burden and Mr. Madrid on the other. The agreement purported to be signed by Mr. Dickie and Mr. Burden and witnessed by Gary Kleaman and Ralph Lanuzel. Pursuant to the terms of the agreement, all relationships as between the two groups of parties were to be severed; in consideration of the receipt of cash and vehicles, Messrs. Bolderson and Dickie

undertook not to discuss or otherwise disclose the activities of Mr. Burden and Mr. Madrid.

34. A review of notes and ledger entries found in the garbage bags seized from the Burden residence was conducted by the forensic accountant attached to the RCMP Proceeds of Crime Section; it indicates that between July, 1992 and August 4, 1993 substantial disbursements were made by Mr. Burden and Mr. Madrid for living and other expenses. The same documents and ledgers reveal that 1992 Land Rovers valued at over $70,000 each were provided by Mr. Burden to Mr. Madrid and Mr. Cowles. Both men were seen driving this vehicle at various times between 1992 and 1995.

35. RCMP surveillance in the summer of 1994, following the execution of search warrants on Mr. Burden and the restraint of some of his proceeds property, demonstrates that Mr. Madrid continued to be involved with Mr. Burden.

36. In December, 1995, after a lengthy investigation, Messrs. Burden, Lanuzel, Westerop and Rolfe were charged with numerous counts of possession of the proceeds of crime involving assets valued at approximately $15 million. Pursuant to a complex plea agreement which included a joint submission of 5 years in prison, Mr. burden entered a guilty plea June 25, 1996, on behalf of himself and his Bahamian corporations, to several of the counts on the Information. In addition, he agreed that the assets subject of the counts were proceeds and consented to their forfeiture to the Crown. The joint submission included the 1992 charge involving 6 tons of hash and Mr. Burden's sentencing proceedings are set for July 23, 1996.

37. In the course of the Burden investigation, members of

the RCMP were provided with a copy of an Irish passport in the name of John Byrne which bore Mr. Madrid's picture. This passport had been used by Mr. Madrid to open a bank account in the Banque Nationale de Paris in Singapore in November, 1989 with a deposit of $300,000. Subsequent deposits were made into the account, bearing number 504-11028-01, and as of May 31, 1996 the balance in the account was $3,504,182.38 in U.S. funds.

38. Mr. Madrid failed to attend for trial of the 1992 drug charge on May 29, 1995 and a warrant was issued for his arrest. In early 1996 U.S. authorities provided the RCMP with information concerning Mr. Madrid's whereabouts, and on May 9, 1996 he was arrested in Acapulco, Mexico on a Provisional Warrant and extradition proceedings were commenced.

39. Plea negotiations took place between Mr. Madrid's counsel David Gibbons, and federal Crown agents and a Plea Agreement was prepared for the signatures of both the agent of the attorney General of Canada and Mr. Madrid and his counsel. Pursuant to the Agreement, Mr. Madrid agreed, inter alia, to facilitate the transfer of the monies in the Singapore bank account belonging to John Byrne to the appropriate authorities in Singapore, and to facilitate in the location of and forfeiture to the Crown of the Land Rover in which he has a possessory interest.

40. Counsel for Mr. Madrid and the Crown could not agree on a joint sentence submission; however, counsel have agreed that the range of sentence in this case is 6 to 8 years on each count, to be served concurrently.

41. An amended Information contained the following charges will be sworn and placed before the court following Mr. Madrid's return to Canada:

a. one count of possession for the purpose of trafficking in hashish, contrary to subsection 4(2) of the Narcotic Control Act in respect of the 6 tons of hashish.

b. one count of possession of the proceeds of crime, contrary to section 19.1 of the Narcotic Control Act with respect to the Land Rover;

c. one count of laundering approximately $17 million U.S. which represents the proceeds of crime, contrary to section 19.2 of the Narcotics Control Act.

SURRENDER Appendix "B"

I, ALBERT JOSEPH MADRID, of Vancouver, British Columbia, on behalf of myself and my heirs, executors, administrators assigns HEREBY SURRENDER absolutely to the Accountant General of Singapore (hereinafter referred to as the "Accountant General") any and all right, title and interest which I may have in the following property:

> the entire contents of bank account number 504-11028-01 located in the Banque Nationale de Paris Head Office, Singapore less all justifiable bank charges, if any;

AND I, ALBERT JOSEPH MADRID, EXPRESSLY REPRESENT AND WARRANT to the Accountant General as follows:

a. that I execute this Instrument on behalf of myself and my heirs, executors, administrators and assigns;

b. that I have possession and control of the monies on deposit in the bank account referred to herein free and clear of all liens, charges, debentures, mortgages, liens, charges, pledges, assignments, security interests, encumbrance or any other claims of any kind whatsoever;

c. that the monies on deposit in the bank account referred to herein are proceeds of crime within the meaning of section 462.3 of the Criminal Code of Canada R.S.C. 1985, c. C-46, as amended;

d. that I have read over this instrument of Surrender

and I understand that it is an absolute Surrender of all my right, title and interest in and to the monies and I make this Surrender freely and voluntarily and under no compulsion, threat or undue influence from Her Majesty of any of Her officers, servants or agents;

e. that I have sought and received independent legal advice from my counsel David Gibbons regarding the execution of this instrument of Surrender;

AND I, ALBERT JOSEPH MADRID, ACKNOWLEDGE AND UNDERSTAND that this instrument is executed by me without prejudice to any rights which Her Majesty now has or may hereafter have in and to the Monies by operation of law or otherwise.

DATED this 12 day of Sept, 1996.

/s/_____
Witness

/s/_____
Albert Joseph Madrid

Appendix "C"

TO: THE BANQUE NATIONALE DE PARIS, SINGAPORE:

I, Albert Joseph Madrid, holder of Irish Passport No. K735061 in the name of John Byrne and holder of account number 504-11028-01 located in the Banque Nationale de Paris Head Office, Singapore registered in the name of John Byrne, hereby irrevocably instruct you to make payment of all the monies in said account, less justifiable bank charges, if any, to the Accountant General of Singapore by way of cashier's cheque, bank draft or similar negotiable instrument made payable to the Accountant General, Singapore.

DATED THIS 12 day of Dec, 1996.

/s/_____
Albert Joseph Madrid also
known as John Byrne

/s/_____
Witness

Copy provided to the Accountant General, Singapore

Appendix "D"

TO: THE ACCOUNTANT GENERAL OF SINGAPORE

I, ALBERT JOSEPH MADRID, holder of Irish Passport No. K735061 in the name of John Byrne, hereby declare that I am the beneficial owner of all the monies remaining in said account;

AND I, ALBERT JOSEPH MADRID do hereby pay the entire monies, less justifiable bank charges, if any, to the Accountant General of Singapore and irrevocably waive all interest in or claim to the said monies.

DATED THIS 12 day of Dec., 1996.

/s/_____
Albert Joseph Madrid also
known as John Byrne

/s/_____
Witness

Copy provided to the Banque Nationale de Paris, Singapore

DECLARATION OF ATTORNEY DAVID W. GIBBONS, Q.C.

I, DAVID W. GIBBONS, Q.C. of #1300 - 355 Burrard Street, in the City of Vancouver, in the Province of British Columbia, Canada, HEREBY DECLARE:

I am a Barrister and Solicitor licensed to practice in the Provinces of British Columbia and Alberta, Canada, and was the lawyer of record for Albert Madrid in the 1992 case against him in Vancouver, British Columbia, Canada.

I have been a lawyer since 1970 and practice criminal law almost exclusively. I have worked for both the prosecution and defence and am presently a Governor of the Law Society of the Province of British Columbia.

In my thirty years experience, Mr. Madrid's case is probably only the second time I have represented a defendant in which a written plea agreement was utilized.

When the plea negotiations occurred in 1996, I was aware that there was a possibility that Mr. Madrid could be prosecuted in the United States of America. I was determined to negotiate a plea agreement so that any admission by my client, Mr. Madrid, would be limited to his actual guilty plea to the three charges counts (possession, importation and distribution of cannabis products, based upon the seizure of six tons on July 16th 1992.)

In my negotiations with the government, it was determined that the government would submit a statement of facts to be attached to the plea agreement as Appendix A. This statement of facts represented the government's opinion as to what the facts were in the case. It was included in the

plea agreement to put Mr. Madrid and myself on notice as to what the government would represent to the court as the underlying facts of this case.

The plea agreement is broken into three sections. The first section (A-E) describes the considerations the Attorney General of Canada gave in entering into the plea agreement. The second section (A-D), describes what the Attorney General of Canada agreed in, and what information the Attorney General of Canada would provide to the court at the time of sentencing. The last section (A-G) outlines what Albert Madrid agreed to.

I discussed the entire agreement with Albert Madrid including the statement of facts, prior to Albert Madrid entering his guilty plea. I assured Mr. Madrid, prior to receiving his authority to sign the plea agreement, that my signature on this agreement would not constitute an admission as to any of the facts alleged by the government in its statement of facts. In formed Mr. Madrid that the statement of facts represented what the government intended to tell the Judge at the time of sentencing, and that my signature only bound Mr. Madrid to the seven items listed as A-G in the third section of the plea agreement.

I would not have signed the plea agreement if I believed, under any interpretation of such agreement, that my signature represented an admission or adoption by my client of the government's statement of facts. I specifically discussed this issue with the counsel for the Attorney General of Canada, and participated in the drafting of this agreement, so that the statement of facts would not constitute any admission or adoption by Mr. Madrid. The authority that I had to sign the plea agreement as Mr. Madrid's agent was predicated on this understanding.

On May 10, 2000, I received a telephone call from Randolph E. Daar, Mr. Madrid's attorney in the United States. Mr. Daar advised me as to the issue that arose with respect to the plea agreement and requested that I appear in Court on May 16, 2000. In response to Mr. Daar's request, I informed him that I have a trial set for May 16, 2000 and would be unable to attend in Florida. I am prepared to make myself available via telephone any morning of the week of May 16th and can personally appear the week of May 22nd 2000.

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration is executed on May 12th 2000 at the City of Vancouver, in the Province of British Columbia, Canada.

/s/ David W. Gibbons

DAVID W. GIBBONS, Q.C.

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[6]

THE COURT: Be seated, folks. Good morning.

My law clerk, Mr. Kennedy, said one of you all wanted to talk to me.

MR. DAAR: Yes, Your Honor, Randolph Daar. Yesterday at the close of the court, the government provided me with a plea agreement between my client and the authorities in Vancouver. I assumed the purpose of providing it to me is it is going to be introduced today.

I'm not certain as to what basis they seek to admit this on with the hearsay exception. And it contains what I consider a prejudicial statement of facts that the government prepared and attached as an addendum to the plea agreement.

The government is -- for the record it's proposed Exhibit 135.

MR. KENNEDY: If I -- may I join in the application, Your Honor, also?

With reference to Mr. Knock, we object on grounds that it does constitute hearsay. And we are deprived of any right of confrontation even if they attribute those statements to Mr. Madrid.

And the fact of the matter is, they are made post conspiracy by Mr. Duboc and by other people who have already been arrested and therefore cannot be in furtherance of the conspiracy.

Thank you, Your Honor.

[7]

MR. DAVIES: Your Honor, may I furnish the Court a copy?

THE COURT: I would like to see it.

MR. DAVIES: Your Honor, the plea agreement of Al Madrid is being offered as a statement by a party opponent. It's admissible under that exception to the hearsay rule. If I could provide the Court with some authority on this. I have a number of cases. United States vs P-A-D-E-N, 908 F. 2d 1229, which is the 5th Circuit in 1990.

That case holds that Rule of Evidence 410 does not bar statements in plea negotiations that actually result in a plea of guilty. And specifically the cite at that case is at page 1234 and 1235.

Also, United States vs. Williams, 104 F.3d 213, 8th Circuit 1996, which holds that plea agreements entered in state court are admissible at trial. Trial guilty pleas are admissible in subsequent collateral criminal trials as admissions of a party opponent. And the specific cite is page 349.

And United States vs. Riley, 684 F.2d 542, 8th Circuit 1982. And that is at page 545. And then finally, United States vs. Andreadis, A-N-D-R-E-A-D-I-S, 366 F.2d 423, [8] 2nd Circuit 1966. And the page cite in that case is at 432, 433.

Your Honor, it's admissible as a party -- as a statement of a party opponent. It's admissible against Mr. Madrid. I think clearly it is a statement by him against his interests that is admissible against him. So to the extent that Mr.

Kennedy is arguing there are Bruton problems with it, definitely the whole plea agreement does not talk about John Knock.

I think he's obligated under Bruton to identify specifically the portions that he objects to under Bruton, and then I should have a chance to redact that. I would inform the Court that I've had the plea agreement typed on disk. I can redact it without putting in "word depleted" or putting in a blank space. I can have it retyped so there is no Bruton references that are improper. It can be completely redacted.

MR. KENNEDY: If I may, Your Honor, briefly, I suggest that one of the orderly fashions in which we may proceed -- because I gather Mr. Davies is not going to make this presentation this morning.

MR. DAVIES: I'm not.

MR. KENNEDY: Your Honor, as to Mr. Daar and I, that we postpone this for a while so we can do a little research. With reference to the references -- in terms of the Bruton problems, Mr. Davies is absolutely right. He can begin by **[9]** taking out the 40 or 50 references to John Knock.
That is at least a start.

MR. DAAR: Your Honor, if I can just be heard.

I think if the Court looks at the actual agreement, the Court will see that there is three pages, the second of which says: And the accused, Albert Joseph Madrid, agrees to the following and states that -- that is at the bottom of the second page, Your Honor. You can see that.

THE COURT: I read that.

MR. DAAR: Then there is something attached to it called appendix, which says: Statement of facts.

THE COURT: Which was actually signed by your client?

MR. DAAR: I disagree with that, Your Honor. At the end of Appendix A, there is a chart. Do you see that?

THE COURT: Yes.

MR. DAAR: Then there is Appendix B.

THE COURT: Yes.

MR. DAAR: And then there is a signature of my client at the page -- that page after. They are not numbered so it's a little hard to tell, after Appendix B, he signed to releasing custody and control of the moneys reflected.

THE COURT: That is true. That is money.

[10]

MR. DAAR: Then you have Appendix C he signed. And then you have Appendix D he signed. But, A, it doesn't purport to be a statement of Madrid.

MR. DAAR: Then you have Appendix C he signed. And then you have Appendix D he signed. But, A, it doesn't purport to be a statement of Madrid.

B, Mr. Madrid never adopted this statement. I do agree with the government can introduce the fact that my client

pled guilty and was sentenced up there.

But they can't introduce through my client the statement against interest which is made by the government and submitted as an appendix to the plea agreement.

THE COURT: When are you going to be using this, Mr. Davies?

MR. DAVIES: I was going to have a witness testify to its authenticity this afternoon. If I can get a stipulation that it's authentic, I wouldn't even go -- have to go into this, just that it's his plea agreement, I've got a certified agreement.

MR. DAAR: I would be prepared to stipulate to that.

MR. KENNEDY: I'm sorry. I'm not able to at this point, Judge.

THE COURT: No problem. You don't have to tell me why.

MR. KENNEDY: I just need to study it.

MR. DAVIES: I understand the Court is not going to rule right now. But, can I respond to Mr. Daar? Your Honor at the very first paragraph of the plea agreement, which [11] Mr. Madrid signs, it refers to -- he is pleading guilty as set out in the statement of facts appended hereto as Appendix A.

He clearly adopted Appendix A by signing the plea agreement. In response to Mr. Kennedy's statement that there are 40 or 50 references to Mr. Knock, I think when you read the plea agreement, you will see that that is not

correct, there are just a few. Some of them are not implicating him in crime. So if there are any Bruton problems, it is a few.

MR. DAAR: Your Honor, if you notice where Mr. Davies just read from, which is -- it's on page 2. It's sub C, Roman numeral II. It says: The full extent of the accused's activities with respect to this case as set forth in the statement of facts, I just referred you to. It says, therefore the Attorney General of Canada agrees to the following. And that is where the statement of facts is listed.

On page -- bottom of page 1, it says: Therefore, the Attorney General agrees, and then the portion that was just read by Mr. Davies is underneath the section in which the attorney general agrees that those are the facts when Mr. Madrid agreed to are listed as A, B, C, D through G.

And there is no mention of Appendix A whatsoever in the portion Mr. Madrid agreed to.

MR. DAVIES: Your Honor --

THE COURT: Well, are you taking the position then that his lawyer cannot bind him in a --

[12]

MR. DAAR: To a statement?

THE COURT: I'm just asking. Is it your position that his lawyer, signing as his agent, can't bind him in a criminal proceeding?

MR. DAAR: I don't think the lawyer can cause him, through the lawyer's words, to make a statement. You enter into a double-hearsay problem I think at that point, Your Honor.

THE COURT: Well, this lawyer cannot being Mr. Madrid in whatever he signed, is not adopted by Mr. Madrid nor binding upon Mr. Madrid? I need to know your position.

MR. DAAR: I understand. I'm not certain. A, from this document whether or not the attorney did agree to what is in Appendix A.

Secondly, I do not believe that the attorney can bind Mr. Madrid into a statement by this first paragraph.

Thirdly, I think it would be an incident of double hearsay at that point.

THE COURT: I have got two of those. You take one, and I'll keep one. Let me ask you where we are on time, on your time line? Are we falling behind?

MR. DAVIES: I think we are going ahead of time this week. We might, in fact, run out of witnesses tomorrow, because we cleared out to make sure that we could get --

THE COURT: That is my heart breaking.

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[58]

That Mr. Lilley or Mr. Lee could not have gone down there and gotten those records themselves. They have not shown any of that. All they've shown is that suddenly CAD, Commercial Affairs Division a branch it sounds to me of the Singapore government, after having been absolutely cooperative as far as we can tell from Corporal Lefler, now has shut down.

Well, they are trying to hide something, Judge, and it is the very fact that they are trying to hide something that the crimes that deprives Mr. Knock of his right of confrontation. That is why this -- this evidence which is so pernicious, so damaging, so prejudicial, about which we cannot say a thing because we can't confront anyone with reference to it.

I'll be happy to answer any questions of the Court. I believe we've briefed it well.

THE COURT: Thank you. Mr. Daar, do you have anything?

MR. DAAR: I would merely just join Mr. Kennedy's motion and comments. And I don't know what the Court's intention is with respect to the plea agreement, but if it plans to admit it, I would have a chance to argue it.

THE COURT: Well, then you better argue it, because I'm going to admit it, subject to any -- Mr. Kennedy says there are some Bruton problems. That -- we have to address

those and he'll have to --

[59]

MR. KENNEDY: Should I move to that, Your Honor?

THE COURT: No. I'll give you sometime. We are going to finish this aspect of it.

MR. DAAR: Do you want me to proceed?

THE COURT: Whatever you wish to argue.

MR. DAAR: Because I sent Mr. Olmo out all day yesterday. He did investigate your question about whether there is some form of agency that attaches because of this document from lawyer to the client. We could not find anything on the point.

THE COURT: We found some American cases saying the lawyer is an agent of his client.

MR. DAAR: I understand the Court's issue. I think under my analysis, I don't think we quite get there. If you just bear with me, Your Honor.

THE COURT: Sure.

MR. DAAR: I tried to read this -- went back to my contracts law. It has been a long time. But I tried to read this plea agreement as an agreement between the parties. And tried to understand what the intention of the parties was, because I think that is critical to analysis of this document.

I read about ten times the first paragraph, the
[60] whereas paragraph, Your Honor.

And what it says to me, at least in the English that I understand, I assume that they use that in Canada even though the accent is different, it's really describes that first paragraph what is the subject of the negotiations.

If the Court would just bear with me, where Albert Joseph Madrid as represented by counsel has entered into plea negotiations. So it is setting the stage. Mr. Madrid has entered plea negotiations through his attorney with agents of the attorney general. Parties. Then it says: With respect to. And that describes what they're talking about with respect to.

It says: With respect to the charges under section blah, blah, so with respect to the charges he is facing. And, with respect to Appendix A. So, in my mind, and my reading of this first paragraph, it says: We are getting together to discuss plea negotiations with respect to those charges and the Government's statement. And if you will take a minute and read that, I think you'd agree with that.

So that is in essence a preamble to an agreement describing who the parties are and what they are talking about.

Then if the Court I'm sure has viewed it, it goes on and discusses what the attorney general of Canada has considered, and then it states what the attorney general has agreed to. Then it states what Albert Madrid has agreed to.
[61] And we already know that he hasn't agreed to Statement A, at least as described on page 2.

He does agree, interestingly enough, and I remembered the parol evidence rule, he does specifically agree to very specific things. The sentencing range, which count he is pleading to, the possession of moneys in the National Paris Bank Singapore, the transfer of moneys, the Land Rover, and the violation, and the fact that he received independent advice. Nowhere does it say anything about Appendix A.

Then, lastly, on page 4, and I think interesting, Your Honor. It says that David Givens as agent for Joseph Madrid. Now, in my mind, that signature agreeing on behalf of Albert Madrid to the terms of the agreement, stated in this -- the portion that said: And the accused, Albert Madrid agrees. What I want to point out to the Court is, interestingly enough, it sates on the bottom: By signing of this agreement, by his counsel, Albert Madrid acknowledges receipt of the same on the same day.

So here is this document. The document is signed -- to be signed by a lawyer. It's describing negotiations between two lawyers, one for the government and one for the defendant. Then at the end of the document it says agent. But, then it goes on to say -- now, normally an agent --if you give an agent a piece of paper, it's presumed that the receipt for the person that -- who the agent represents is presumed.

[62]

But here in this agreement, they actually outline what the presumption is. They say: By an agent signing this, it's presumed that you receive it.

Now, that is one right. A far better right would be: You are presumed to have signed it, which it does not say.

Appendix A, Your Honor. Okay. So that is the first part of my analysis.

The second part of my analysis is whether or not what is called a statement of facts is in fact a statement under this rule. And you look at various things to determine whether something is a statement or not. Is it signed? Is it not signed. Does it contain information outside of the personal knowledge of Mr. Madrid? Absolutely. It's full of information that Mr. Madrid could not have given them and could not have known whether it's true or not, information about what the government did, what other people did and so forth.

It's created by the prosecution. We now know that. So I think in the first analysis it's not a statement. I think in the second analysis, the document itself is a form of agreement, but it's not a plea. It is not a written plea.

Nowhere in that -- no where in that agreement does Albert plead guilty. He agrees to enter a plea. And he agrees to forfeit, and the government agrees to make a recommendation. And what it says is this is not even binding. This is really an agreement between two lawyers about what is going to happen **[63]** in the future.

Madrid personally signed his rights to give up money. In two -- the other two appendices, whatever they are, C and D, two or three, other appendixes. In each one on a different date, which means it was brought back to Madrid, one -- on September 12th he signs one. And he signs one on December 12th. And he signs a third one on December 12th. So each of those, the appendices where Mr. Madrid is giving up far less, he is just giving up money or a car or something like that, he has to personally sign it.

But here, the government is seeking to introduce this entire statement -- I don't think it is a statement. I don't think the lawyer adopted it. And if he did adopt it I don't think his adoption is sufficient. Then we get to another level. Spent a lot of time on this so bear with me. You denied my motion for prejudicial delay. Motion to dismiss.

However, if we look at this document, and one of the cases cited by the government, it said that if one entity can colludes with another entity to obtain a statement as part of a plea so that the second entity can use that statement and that knowledge is not made available to the person making the statement, that that is a form of collusion that can prevent the statement from being used in the second court.

Okay. That is in one of the cases cited by the government. It is -- as a matter of fact, as a matter of fact **[64]** the Williams case, the case cited by the government. In this case, Your Honor, we know several things. We know that Mr. Knock and Mr. Duboc were indicted in 1994.

We know from the Government's response to my prejudicial delay motion that they were considering indicting Madrid then, but they chose to wait since he was already in custody or this is actually after Roberts. If we look at this document, this document is in 1996.

So this is an example of the prejudice that my client potentially could suffer as a result of delay had he been indicted at the same time as Knock and Duboc there is -- he could not have made this statement. His lawyer said, no, you have been indicted in Florida, you can't possibly make this statement. We know as of 1994 that these two agencies were talking to each other.

In the notes provided to me by the government, the AUSA within days of January of '94, is talking to law enforcement in Vancouver. So there is ample evidence of communication. I would say to the Court that if it's the Court's intention I'm entitled to a hearing.

Now, I know we are in the middle of trial, Your Honor. The government -- has now shown me 20 boxes in a room and said anything in the room can be introduced -- the government knew this was a potential issue.

Had they said: Look, we are going to try to put this **[65]** in. Let's talk about this before the trial. I would have had a reasonable opportunity. But, it's the last minute. I found out about it yesterday. There is pressure on us to finish, but I think that I'm entitled to a hearing. I'm entitled to talk to the government lawyers, to law enforcement and find out if those was any coercion.

Then we go to the next step, which is: Was a statement made voluntarily? What are the laws in Canada? What did Mr. Madrid's counsel advise him? I mean, those things do have to be looked at. There is a presumption in this case about pleas in the United States. This is a plea in Canada.

I think I would be entitled to a hearing with Mr. Givens who was the attorney in Canada to find out actually what Mr. Madrid was told with respect to this statement, whether he adopted it or not. Lastly, I wonder what the real probative value of this document is, Your Honor.

I have no objection to the plea being introduced. I have no objection to the fact that he forfeited money in banks and the car to be introduced. That he admitted these crimes to be introduced. This statement -- what probative value does

the fact that the government is getting Madrid to plea which includes an appendix which gives their opinion about what happened.

How does that become valuable evidence for the jury? It's highly prejudicial. There is no question about it. I **[66]** mean, if this document gets in and the government succeeds in drawing the inference that they want, which is that: Gee, all of this is true, because Madrid signed it, it puts me in a terrible position.

I think it's a very prejudicial document. It contains so many things outside of my personal knowledge, including things that the government did. The government has ample proof of everything that is in here.

We've heard ad nauseam proof about Vancouver. They get the plea in, what is the -- what is the probative value of the appendix? So I would ask that if you are going to go forward with this, that I be given an opportunity to have a hearing.

And I will do the best I can in whatever time I have. But I think I should have that opportunity. With respect to the voluntariness of the statement, the advice that he received from his counsel, and any form of collusion that occurred between the two entities.

THE COURT: Government wish to respond?

MR. DAVIES: Yes, sir.

In response to Mr. Daar's argument there is no coercion between United States and Canada with regard to this plea agreement. I never spoke to the Canadian authorities, nor

did Mr. Hankinson, Mr. Lilley or Mr. Lee. There is simply no evidence of coercion. That is not the case.

[67]

More importantly, Your Honor, we gave notice of this plea agreement that we would be offering it into evidence back in August of 1999. I mean, they've known about this. It's not like I just sprung this on them. They knew about it last summer. I have got case law that motions to suppress, pretrial motions and they shouldn't be allowed. Defense lawyers should not be able to make them, the Court should not entertain them during trial, because obviously if you grant it during the trial, we can't take you up. We are just out the window. That is why they need to make them before trial.

There was no motion before trial. No request for a hearing, no arguments of collusion, none of this stuff that he is raising now was ever raised pretrial. There was no collusion. You have got the plea agreement in front of you.

All of his arguments, all of Mr. Daar's arguments, go to the weight of the evidence not its admissibility. The Court's indication that the plea agreement is admissible -- the Court made earlier -- is the correct indication. I have got the case law, the plea agreements are admissible. Case law that the lawyer has acted is it's somehow admitted subject to a Bruton redactions that need to be made.

With regard to Mr. Kennedy's argument. First of all, the Court should be aware that the other Rocky Creek evidence is about Rocky Creek Development or another Rocky Creek entity. There is going to be no other evidence about the Rocky Creek

[71]

MR. KENNEDY: I understand you're not. If, in fact, the Court rules against me, and the Court will know that I'm opposing it, we'll then go into redaction and I will be prepared at that point to address the Bruton points specifically.

But, let me say this with reference to the Madrid plea agreement on behalf of Mr. Knock on why it's not admissible.

The Williams, Holmes, Riley and Andrews cases relied upon, cited by Mr. Davies yesterday all are cases wherein a prior guilty plea was admissible against a co-defendent, not the underlying factual basis for the plea, not the plea agreement.

In Padin, plea negotiations were admissible, but in Padin, judge, they were admissible at a sentencing hearing. And we all know that at a sentencing hearing we have much broader rules with reference to evidence, and it's admissible because the judge, Your Honor, for example is trying to take as much information as he possibly can in order to make the most difficult decisions that judges have to make.

Now, with reference to the -- to the plea statement itself, it is not a statement of Albert Madrid's. It's in fact a statement based in part on Duboc, based in part upon Vacca, based in part upon independent investigations by representative of the Royal Canadian Mounted Police and a [72] whole lot of please EMS so it's a conglomeration and synthesis of a tremendous amount of very prejudicial information.

It's not made in furtherance of a conspiracy. And therefore cannot fit into the hearsay -- that hearsay exception of matters stated in furtherance of the conspiracy.

Because -- the reason it's not made in furtherance of the conspiracy is because it is a narrative discussion of past events made by people who have already made deals.

THE COURT: Well, is that not made -- that being offered as an admission by Mr. Madrid, not applicable to the other conspirators, his admissions, his wrongdoing?

MR. KENNEDY: If in fact that is -- yes, Judge. If, in fact, those statements had been made by Mr. Madrid, then theoretically it would be an admission of Mr. Madrid, theoretically admissible against him. But, not of course against Mr. Knock.

But those statements are made by people such as Duboc and Vacca. It's not even made against their penal interests, because they've already made their deals and they are out of them. And finally, the probative value, I suggest is limited.

Probative value is limited because there is very little that I find in here that hasn't already been attested to by other Mounties or by other witnesses here. Whereas the prejudicial value is extremely great.

THE COURT: You don't see a difference between me **[73]** testifying that you did or said something, and you getting on the stand and admitting you did it or said it, big difference isn't it?

MR. KENNEDY: If I get on the stand and admit I did it, Your Honor, that is an admission against me which is

usable.

THE COURT: I understand.

MR. KENNEDY: If you say it, for example, God knows I wouldn't paint you with this brush: But if you were Mr. Duboc or Ms. Vacca and you said it, that would not be admissible.

THE COURT: That is just the point I was making. You said it wouldn't make any difference it's already there, therefore it makes a big difference.

MR. KENNEDY: At least the last point I was making is because part of the difficulty of your job, I don't have to tell you, you've been doing it for many years and you do it well, is to balance probative value versus prejudicial.

I'm saying when you look at that balance, the probative value is vastly outweighed by the prejudice. That is the point.

THE COURT: Do you want to address any further the government's response on their reasonable efforts? They said they -- have undertaken everything possible. That -- to get it. They can't get it.

They won't give them the records. They won't respond

[80]

THE COURT: We don't want to talking about Bruton yet.

MR. KENNEDY: That is all I need to know.

MR. DAAR: One, I would proffer to the Court that in the documents provided to me on January 11th, 1994, David McGee was in contact with Hong-do, as the chief investigating person for the RCMP, and that was two years prior to Mr. Madrid's statement.

Second, I would proffer to the Court that if Mr. Madrid's lawyer, David Gibson, was subpoenaed to this court, that he'd testify that he told Mr. Madrid that the Appendix statement A could not and would not be attributed to him in any proceeding based on his understanding of the law at the time that this agreement was signed.

I would also --

THE COURT: Well, why don't you bring him in then? We'll postpone this until then until Tuesday.

You have him here Tuesday morning.

MR. DAAR: Sorry?

THE COURT: Have him here Tuesday morning or put your client on the stand. It can't be used against him in anything except the hearing if that is what you want.

MR. DAAR: Let me discuss that with my client.

THE COURT: Sure. Take a short break, folks.

(Recess taken.)

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THE COURT: Be seated.

Yes, sir.

MR. HANKINSON: Your Honor, I think because there have been several discussions about what has or has not been disclosed, it would be proper for us to file with the Court the discovery letters that we filed in this case. And I would like to do so at this point.

In addition, I would represent that prior to the trial, starting I believe it was Wednesday or Thursday prior to trial, that I sent a copy of the evidence list, the same evidence list that we are working from at trial to the defense attorneys for their perusal. It is the same evidence list given to the Court.

THE COURT: You can file it.

Any other argument anywhere on the admissibility of the testimony we now have under consideration?

MR. DAVIES: No, sir. Not from the government.

MR. KENNEDY: Submit it, Your Honor.

MR. DAAR: Just briefly, Your Honor.

On behalf of Mr. Madrid, we proffer to the Court that we will make efforts to obtain the presence of David Givens who was Mr. Madrid's counsel on Tuesday. And that would provide the Court with, I believe, credible authority for serving that it was not an adoption, which I believe is the Court's theory.

THE COURT: We'll hold off on that until Tuesday.

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THE COURT: Be seated, folks. Good morning.

My law clerk said someone wanted to talk.

MR. DAVIES: Yes, sir, I did. The government would offer Government Exhibit 135, which is the plea agreement of Al Madrid, with appendixes. It has been redacted to remove reference to Mr. Knock.

Mr. Kennedy and Mr. Daar have seen that. They agree that there aren't any Bruton problems with the plea agreement as redacted.

MR. DAAR: May I be heard on that?

THE COURT: Absolutely.

MR. KENNEDY: One second

Your Honor, Mr. Davies is absolutely correct. I just want the record to reflect that that does not -- the fact that we have Brutonized that agreement, does not, of course, waive our fundamental objection to its admissibility. Thank you, sir.

THE COURT: All right. And I assume Mr. Daar is ready to speak to that?

MR. DAAR: Obviously at this point, the Court, I guess

to some degree, has conflicting declarations. I have received and reviewed the declaration from the government attorney. And I have compared it, as I'm sure the Court has, to the affidavit of Mr. Givens. I would represent to the Court that I continue to offer Mr. Given's availability -- but I **[9]** can't have him here absent some need for the court to have him here.

If you compare the two declarations, the one thing unaddressed by the Government's declaration, which I know is important in the Court's reasoning, is the agency principle by which Mr. Madrid's attorney signed the agreement. The Court brought that up at the first hearing on this. And in the declaration of Mr. Givens, I believe that he clearly states that he had, in essence, a conditional agency from Mr. Madrid.

And that it was his understanding that -- Mr. Madrid's understanding that his signature would not bind Mr. Madrid to the agreement as to the government's statement of facts, which I think removes any admission based on the agency, since the agency was limited and conditional.

Obviously the government attorney cannot and has not addressed that, because she was not a party to the discussions between Mr. Madrid and counsel. In addition to what has been submitted to the Court, it's my understanding at the time Mr. Givens signed this agreement, Mr. Madrid was still in Mexico.

Lastly, I would offer to the Court that the government attorney says that it was her understanding that Givens and Madrid agreed to these submitted facts. There is no affirmative statement in that she discussed specifically this issue with Mr. Givens, or that Mr. Givens said to her: I

[10] have authority to sign this. I have authority to accept this statement of facts.

If Mr. Givens had said such a thing to her, she would have said, rather than -- it's my understanding she would say: I recall that Mr. Givens represented to me that he had authority to accept these facts on behalf of Mr. Madrid.

I offer to the Court paragraph number 4 implied merely that it was her understanding, and she does not give a factual basis for that understanding. So it seems to be almost a silent understanding, a presumption if you will.

THE COURT: What does your lawyer say is the factual basis for understanding --

MR. DAAR: Well --

THE COURT: -- between him and his client? He just used the same words, didn't he?

MR. DAAR: Let me -- that is a good question. Let me get there. Well, he says: I assured Mr. Madrid, prior to receiving authority to sign the agreement, that my signature would not constitute an admission. That would be an affirmative statement rather than just it was assumed between Mr. Madrid and I.

So I think there is an uncontradicted affirmative statement before this Court as to the limitations on the agency and as to both Mr. Given's and Mr. Madrid's understanding that the signature would not bind Mr. Madrid to that statement of [11] facts.

Lastly, I reread the statement of facts, Your Honor. I

don't believe it adds anything of significant evidentiary value. There is certainly evidentiary value to the fact that Mr. Madrid pled. I have never admitted to the admission of the plea agreement.

But, when you read through that statement, there really isn't significant new evidence that this jury hasn't heard in one form or another from a hundred or so witnesses and 260 exhibits. It tends to be cumulative, repetitive and a summary almost.

And, hence its evidentiary value is very limited. Unfortunately, it contains numerous statements about facts which Mr. Madrid could not possibly have knowledge about. And I think it's highly prejudicial for this jury to, in essence, believe that Mr. Madrid adopted those statements which he had no information about while he was in Mexico through his attorney in a limited agency situation.

I think it's very, very prejudicial. And I would urge the Court to reconsider its initial feelings on the matter.

THE COURT: Okay. Thank you. Government.

MR. DAVIES: Your Honor, all evidence is prejudicial. Rule 401 and 403 exclude unfairly prejudicial evidence. This is not unfairly prejudicial. It's prejudicial because it's **[12]** relevant. It shows the defendant's guilt. The evidentiary value is there because it's a statement by a party and his agent. That has got value that statements of cooperating defendants don't have.

Your Honor, the written plea agreement is clear. It is signed by Al Madrid's agent. It's specifically signed by David Givens as agent for Albert Madrid. Appendix A is

attached to and referred to in the plea agreement.

Mr. Madrid's lawyer, David Givens, his affidavit first of all shouldn't be credited. I understand the Court can consider hearsay in making this ruling, but it shouldn't be credited because it's unreliable hearsay. I submit it's incredible that a lawyer would sign a plea agreement with four appendixes and specifically sign it as his client's agent, and somehow think that it's not somehow a statement of his client.

I can't cross Mr. Givens about that. His affidavit simply isn't credible. Also the prosecutor in Canada told me, and she submitted an affidavit that she understood that by signing the plea agreement, Al Madrid admitted to all of the facts in the appendixes, which has standing, and certainly should be the Court's understanding. It is a reasonable understanding for the jury to reach.

Ms. Bruker also said she wouldn't have entered the plea agreement, would not have entered it if it wasn't the case that the defendant was admitting to the facts, and in fact she **[13]** would have had the plea agreement struck.

In looking at those affidavits, I would also point out that according to Russ Lefler, the RCMP officer, he has evidence that Al Madrid fled to Mexico and David Givens never reported where Al Madrid was.

There is also evidence that David Givens received a large fee, which may have been drug proceeds. I can't cross-examine him about any of that. That goes to the credibility of the affidavit also.

What David Givens says in his declaration doesn't make

any sense. It's belied by Theresa Bruker. But, more importantly, it's belied by the plea agreement itself. Regardless of what Mr. Givens says in his affidavit, that goes to the weight that should be given to the plea agreement, even assuming Mr. Givens is correct. It goes to the plea agreement's weight, not is admissibility, especially given the affidavit of Ms. Brucker, especially given the language of the plea agreement.

Your Honor, the Court has got a plea agreement which is signed by Al Madrid's lawyer as Al Madrid's agent. Those are the specific words on the signature block. The question to the Court is the plea agreement's admissibility.

Rule of Evidence 801D2B says it's an authorized statement by a party. B2D, it's a statement by his agent. **[14]** There are three different rules of evidence under which this document is admissible.

The bottom line, I would submit to the Court, the government would submit, is that the defendant cannot bar admission of a statement that he is responsible for by saying: Well, I didn't mean it. He can put forth evidence to say that he didn't mean it.

He can try to convince the jury that he didn't mean it. But, as to admissibility, and that is the question here, the plea agreement is admissible and the Court should admit the plea agreement.

MR. DAAR: Your Honor, just briefly.

THE COURT: Uh-huh.

MR. DAAR: Once again, I would -- and I made this

argument initially, I will just touch upon it. If the Court goes back and looks at the actual plea agreement, you will see there is a section which says, Al Madrid hereby agrees, pursuant to this plea agreement. That section lists about -- of the top of my head -- six or seven lettered categories, A through G, which Mr. Madrid agrees to.

What is not in that section, Your Honor, is that Mr. Madrid hereby agrees or adopts the set of facts offered by the government. And if the Court would just look at that and bear with me for a moment, you see that section that relates to Albert Madrid, Your Honor?

[15]

THE COURT: Uh-huh.

MR. DAAR: You'll see it lists all of the things that Mr. Madrid agrees to pursuant to that agreement. But the thing it doesn't list is that Mr. Madrid hereby adopts the Government's statement of facts.

The statement of facts is mentioned in what the government is going to do. It says: The government is going to present to the sentencing court the statement of facts contained in the appendix. But in what Madrid is going to do, it is silent.

And I think if you look at the clear wording, you know, I have to -- the parol evidence rule, and everything else, if you look at the clear wording of this agreement, nowhere in it does it say that Mr. Madrid hereby, pursuant to this agreement, adopts these facts.

And there is a section of what Al Madrid agrees to. It is

not there, Your Honor. And I think that we can accept the writing of this instrument as guiding us as to what the understanding of the parties was.

And, Your Honor, you know, admittedly, they do pleas differently in Vancouver. But here in your court, you would have this defendant swear to these facts and acknowledge them on the record before it would be considered an admission. This is almost the equivalent of what the government in our country would submit to the probation officer as their version of the **[16]** facts, even on a negotiated plea.

THE COURT: Anything further by the government?

MR. DAVIES: Just, Your Honor, that when we submit things to the probation officer, they are not signed by the defense lawyer as agent for the defendant. All of Mr. Daar's arguments he can make to the jury. They go to the weight of the evidence. This evidence is admissible.

THE COURT: I'm going to admit it. The redacted version cures Bruton. Anything else?

MR. HANKINSON: Judge, we also will be offering -- I don't think there was any legal argument about it, Government Exhibit 161, 162, and 163. Those are the items seized from Duboc in Hong-Kong. I think at the time the defense had indicated that they hadn't had a chance to look at those items. We will be re-offering them in front of the jury.

We also will be offering a series of stipulated business records in front of the jury. I think the defense has looked at them. I don't think there is anything controversial about

those items.

THE COURT: What about 161, 162, 163? Any further objections?

MR. KENNEDY: No, Your Honor.

THE COURT: Thank you. Mr. Daar?

MR. DAAR: No, Your Honor.

THE COURT: Thank you. They will be received. ...